(1)

No. 00-1567-CFX Title: Cornelius P. Young, et ux., Petitioners
v.
United States

Docketed: April 11, 2001 Court: United States Court of Appeals for the First Circuit

Entry	Date	Proceedings and Orders
	Mar 1 2001	Petition for writ of certiorari filed. (Response due June 11, 2001)
	May 3 2001	Order extending time to file response to petition until June 11, 2001.
	Jun 11 2001	Brief of respondent United States filed.
	Jun 27 2001	DISTRIBUTED for Conference of September 24, 2001
	Sep 25 2001	Petition GRANTED.
		SET FOR ARGUMENT January 9, 2002.
		**********
	Oct 11 2001	Record filed.
	Nov 9 2001	Brief of petitioner Cornelius P. Young, et ux. filed.
	Nov 9 2001	Joint appendix filed.
	Dec 3 2001	CIRCULATED.
	Dec 10 2001	Brief of respondent United States filed.
	Jan 2 2002	Reply brief of petitioner Cornelius P. Young, et ux. filed.
	Jan 9 2002	ARGUED.

(1)

Supreme Court, U.S.
FILED

001567 MAR - 1 2001

OFFICE OF THE CLERK

No. _____

In the
Supreme Court of the United States

In re:

CORNELIUS P. YOUNG and SUZANNE P. YOUNG,
Debtors,

CORNELIUS P. YOUNG and SUZANNE P. YOUNG,
Debtors/Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

VICTOR DAHAR,
Trustee.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Youngs' 1992 income tax obligation was discharged by the entry of a discharge in their 19[illegible]apter 7 bankruptcy case where the three-year period set forth at §507(a)(8)(A)(i) of the Bankruptcy Code had elapsed between the due date of their tax return and the filing of their chapter 7 bankruptcy case.

2. Whether the three-year period set forth at Bankruptcy Code §507(a)(8)(A)(i) was tolled or extended by the length of time that the Youngs were debtors in a prior chapter 13 bankruptcy, notwithstanding the absence of any language in §507(a)(8)(A)(i) or elsewhere that would allow such tolling.

PARTIES TO THE PROCEEDING

Petitioners/Debtors

Cornelius P. Young and Suzanne P. Young, individuals with no corporate affiliations.

Respondent

The United States of America.

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The opinion of the court of appeals is reported at *Young v. United States (In re Young)*, 233 F.3d 56 (1st Cir. 2000), and is reproduced in App. A at 1a - 10a. The Order of the United States District Court for the District of New Hampshire is not reported, but is reproduced in App. C at 12a - 13a. The opinion of the United States Bankruptcy Court for the District of New Hampshire is reported at *Young v. United States (In re Young)*, 1999 Bankr. Lexis 557; 99-1 U.S. Tax Cas. (CCH) ¶50,553; 83 A.F.T.R.2d (RIA) 2876, and is reproduced in App. D at 14a - 22a.

JURISDICTION

The opinion of the United States Court of Appeals for the First Circuit was issued on December 1, 2000, and was modified by an *Errata* issued December 20, 2000. This court has jurisdiction under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The statutes involved are all found in the Bankruptcy Code, 11 U.S.C. §101 *et seq.*, hereinafter cited as Bankruptcy Code §__. The particular provisions of the Bankruptcy Code are as follows:

Bankruptcy Code §727 provides:

> (a) The court shall grant the debtor a discharge, ...
>
> (b) Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts

that arose before the date of the order for relief under this chapter, ...

Bankruptcy Code §523 provides:

(a) A discharge under §727, 1141, 1228(a), 1228(b) or 1328(b) of this title does not discharge an individual debtor from any debt —

(1) for a tax or a customs duty —

(A) of the kind and for the periods specified in section 507(a)(2) or 507(a)(8) of this title, whether or not a claim for such tax was filed or allowed;

(B) with respect to which a return, if required —

(i) was not filed; or

(ii) was filed after the date on which such return was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition; or

(C) with respect to which the debtor made a fraudulent return or willfully attempted in any

manner to evade or defeat such tax; . . . .

Bankruptcy Code §507(a)(8) provides:

(8) Eighth, allowed unsecured claims of governmental units, only to the extent that such claims are for —

(A) a tax on or measured by income or gross receipts —

(i) for a taxable year ending on or before the date of filing of the petition for which a return, if required, is last due, including extensions, after three years before the date of the filing of the petition; [or]

(ii) assessed within 240 days, plus any time plus 30 days during which an offer in compromise with respect to such tax that was made within 240 days after such assessment was pending, before the date of the filing of the petition;. . . .

STATEMENT OF THE CASE

The petitioners, Mr. and Mrs. Young, filed their 1992 federal income tax return with the Internal Revenue Service (the "IRS") on October 15, 1993, after obtaining extensions from the usual April 15 filing date. The IRS assessed the tax in accordance with 26 U.S.C. §6501 (Internal Revenue Code §6501) on January 3, 1994. Since the Youngs had not paid their tax obligation, they made monthly installment payments to the IRS between April 1994 and November 1995, initially at $50 per month and later at $300 per month. The Youngs did not sign or file an offer in compromise with respect to this tax obligation.

The Youngs then filed a chapter 13 bankruptcy proceeding in the United States Bankruptcy Court for the District of New Hampshire on May 1, 1996. As required under chapter 13 (Bankruptcy Code §1322(a)(2)), they filed a chapter 13 plan which provided, among other things, for payment in full of their 1992 income tax obligation by making monthly plan payments through the chapter 13 trustee of $300 each for sixty months. The IRS filed a proof of claim with the bankruptcy court setting forth a so-called "priority" claim (which would have to be paid in full) for the Youngs' 1992 tax year of $12,736.17 and a non-priority claim of $4,933.87. Although the Youngs made several chapter 13 plan payments, their plan was not confirmed (Bankruptcy Code §1325).

On October 23, 1996, a bit less than six months after they filed their chapter 13 bankruptcy petition, the Youngs filed a request for dismissal of the chapter 13 proceeding in accordance with Bankruptcy Code §1307(b). Thereafter, after an administrative expense request of the chapter 13 trustee was granted, the Youngs' chapter 13 case was closed on March 13, 1997. Since their chapter 13 plan had never been

confirmed, the plan payments they had made to the trustee were returned to the Youngs. Bankruptcy Code §349(b)(3).

On March 12, 1997, the Youngs filed a chapter 7 bankruptcy petition in the New Hampshire bankruptcy court. They were granted a chapter 7 discharge on June 17, 1997, after which, on September 22, 1997, their chapter 7 case was closed. It was then reopened on July 13, 1998, at the Youngs' request, to allow them to file a complaint with the bankruptcy court to determine whether their 1992 income tax obligation had been discharged. Ruling on cross motions for summary judgment, the bankruptcy court held that the Youngs' 1992 income tax obligation was not discharged by their 1997 chapter 7 bankruptcy discharge. The Youngs appealed the bankruptcy court's decision to the United States District Court for the District of New Hampshire, which affirmed the bankruptcy court's ruling. The Youngs then appealed to the United States Court of Appeals for the First Circuit, which affirmed the judgment of the district court. This petition for review of the judgment of the court of appeals followed.

The basis for federal jurisdiction in the United States Bankruptcy Court for the District of New Hampshire is 28 U.S.C. §1334, the Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire dated January 18, 1994, (DiClerico, C.J.) and 28 U.S.C. §157.

ARGUMENT FOR GRANTING THE PETITION

I. There is a profound split among the decisions of the courts of appeal that have ruled on this matter.

Under a plain reading of the provisions of the Bankruptcy Code, the Youngs' 1992 tax obligation should have been discharged with the issuance of their 1997 bankruptcy discharge, since the three-year period under §507(a)(8)(A)(i) had elapsed between the filing of their tax return on October 15, 1993, and the filing of their chapter 7 bankruptcy petition on March 12, 1997. Had the Youngs resided in Texas, rather than New Hampshire, when they filed their chapter 7 petition, their tax obligation almost certainly would have been discharged under the Fifth Circuit's ruling in *Quenzer v. United States (In re Quenzer)*, 19 F.3d 163 (5th Cir. 1993). Similarly, if they had lived in Ohio, the Youngs would have prevailed, absent a finding of misconduct or manipulation of the bankruptcy system on their part, under the Sixth Circuit's holding in *Palmer v. United States (In re Palmer)*, 219 F.3d 580 (6th Cir. 2000). Again, had the Youngs resided in Georgia, their tax obligation would have been discharged, subject to the bankruptcy court's review of "the equities," under the Eleventh Circuit's ruling in *Morgan v. United States*, 182 F.3d 775 (11th Cir. 1999).

Five other circuits, however, through what is at times cacophonous reasoning, have arrived at the opposite result and denied discharges to debtors in similar circumstances. For example, the Ninth Circuit held, in *West v. United States (In re West)* 5 F.3d 423 (9th Cir. 1993), *cert. denied*, 511 U.S. 1081 (1994), that the 240-day period set forth at Bankruptcy Code §507(a)(8)(A)(ii) would be tolled or extended for the period of the debtors' prior bankruptcy proceeding plus six months, notwithstanding the absence of any language in §507(a)(8)(A)(ii) that permitted such tolling or extension. The court held that this was the "rare case" where the plain meaning of the statute should give way to the intent of Congress as discerned by the court. Likewise, the Eighth Circuit, in *Waugh v. Internal Revenue Service*, 109

F.3d 489 (8th Cir. 1997), *cert. denied*, 522 U.S. 823 (1997), invoked the "rare case" exception to the plain meaning rule and held that the court's perception of congressional intent should control. Similarly, the Third Circuit ruled in *In re Taylor*, 81 F.3d 20 (3rd Cir. 1996), that following the plain meaning of the statute would result in "absurd results" and "taxpayer[s] abuse." In the Tenth Circuit, the court of appeals ruled that the 240-day period in Bankruptcy Code §507(a)(8)(A)(ii) was tolled through application of Bankruptcy Code §105(a), which allows a bankruptcy judge to issue any order ". . . that is necessary or appropriate to carry out the provisions of this title." Finally, the Seventh Circuit weighed in on the issue in *Montoya v. United States (In re Montoya)*, 965 F.2d 554 (7th Cir. 1992). In that case, the Montoyas did not contest the tolling or extension of the three-year period in Bankruptcy Code §507(a)(8)(A)(i). Instead, they argued that the IRS could not add to the tolling calculation the period of time the IRS' claims had been disallowed in their prior bankruptcy proceedings. On this issue, the Montoyas lost, the court holding that the IRS was entitled to a full three years and six months, unfettered by the automatic bankruptcy stay and the temporary disallowance of its claims in the bankruptcy court, to collect its assessment.

It is to this parade that the First Circuit attaches itself, declaring that ". . . Congress appears never to have thought about the precise problem posed by the Youngs' successive petitions[.]", App. A at 7a. Yet Congress, in enacting the Bankruptcy Code, does seem to have thought about the problem of different dischargeability results resulting from the filing of successive petitions, since Bankruptcy Code §523(b) provides:

> Notwithstanding subsection (a) of this section, a debt that was excepted from discharge under

> subsection (a)(1), (a)(3), or (a)(8) of this section . . . . in a prior case concerning the debtor under this title, ... is dischargeable in a case under this title, unless, by the terms of subsection (a) of this section, such debt is not dischargeable in the case under this title.

The decisions among the circuit courts of appeal have resulted in different dischargeability outcomes for debtor-taxpayers situated in identical circumstances. This court needs to rule on the issue to resolve the conflict among decisions of the circuits.

II. The Question Presented Is Important

Since 1990, the number of bankruptcy cases filed in the United States has exceeded 750,000 annually, and since 1996, the number has increased to well over 1,000,000 per year. Bankruptcy cases are by far the largest category of legal proceedings handled by the federal courts.

While no statistics appear to be available, it is plain that not all bankruptcy filings present questions about the dischargeability of income taxes. Of those that do, only a small percentage involve the issue raised in this case, where serial bankruptcy filings are involved. Nevertheless, on an absolute basis, the number of times the question arises is significant, as evidenced by the number of reported cases at the bankruptcy court, district court and bankruptcy appellate panel levels.

This case also presents an important jurisprudential question as to how federal courts should apply the plain meaning of federal statutes in accordance with the holdings in cases such as *United States v. Ron Pair Enterprises, Inc.*, 489

U.S. 235, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989), particularly where the statutory provisions at issue are as detailed and carefully drawn as those found in the Bankruptcy Code and the Internal Revenue Code.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

[Filed December 1, 2000]

No. 00-1484

IN RE: CORNELIUS P. YOUNG)
and SUZANNE P. YOUNG,)
Debtors)
CORNELIUS P. YOUNG)
and SUZANNE P. YOUNG,)
Debtors-Appellants,)
)
v.)
)
UNITED STATES OF AMERICA,)
Appellee.)
)
VICTOR DAHAR, Trustee.)
)

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF NEW HAMPSHIRE

December 1, 2000, Decided

Hon. Steven J. McAuliffe, U.S. District Judge

Before Torruella, Chief Judge, Bownes, Senior Circuit Judge, and Boudin, Circuit Judge.

OPINION

BOUDIN, Circuit Judge. Having obtained a filing extension, Cornelius and Suzanne Young filed their 1992 federal income tax return on October 15, 1993. Their return showed taxes due after withholding, but no payment accompanied the return. Instead, the Youngs made modest payments to the IRS for a number of months and then, on May 1, 1996, filed for Chapter 13 bankruptcy, 11 U.S.C. § 1321 (1994). This automatically stayed all IRS efforts to collect taxes from the Youngs. Id. § 362(a)(6).

To complete a Chapter 13 bankruptcy--typically a proceeding that lasts several years--requires that tax claims be paid in full. 11 U.S.C. § § 507(a)(8), 1322(a)(2). At the outset, the IRS filed a proof of claim for the unpaid 1992 taxes. However, the Youngs did not stay the course; instead, on October 23, 1996, the Youngs moved to dismiss their petition. Id. § 1307. The bankruptcy court did so on March 13, 1997, which would normally terminate the automatic stay.[1] Id. § 362(c)(2).

---

[1] The Youngs argue that the automatic stay was lifted upon their motion to dismiss rather than when the bankruptcy court closed the case. Because the choice of dates does not affect our analysis or outcome, we assume for simplicity's sake that the closing date controls.

One day before the Chapter 13 proceeding was closed, the Youngs filed a new "no asset" bankruptcy petition under Chapter 7. This in turn continued the automatic stay pendente lite. Chapter 7 is usually a brief proceeding to distribute non-exempt assets to creditors. On June 17, 1997, the Youngs received a discharge in the Chapter 7 proceeding, generally discharging their debts "[e]xcept as provided in section 523 [of title 11]," 11 U.S.C. § 727(b).

After the discharge the IRS sought the unpaid balance for the Youngs' 1992 taxes, and the Youngs then asked the bankruptcy court to rule that their remaining 1992 tax liability had been discharged. The IRS countered that section 523(a)(1)(A) of the Bankruptcy Code precludes the discharge of any debt "for a tax . . . of the kind and for the periods specified in section . . . 507(a)(8)," 11 U.S.C. § 523(a)(1), which includes in pertinent part unsecured government claims for income tax

> for a taxable year ending on or before the date of the filing of the petition for which a return, if required, is last due, including extensions, after three years before the date of the filing of the [bankruptcy] petition . . . .

11 U.S.C. § 507(a)(8)(A)(i).

This convoluted language is commonly understood to describe claims for taxes for which the return was due three years or less before the petition was filed. The Youngs' 1992 return was due on October 15, 1993; more than three years before their Chapter 7 petition was filed on March 12, 1997. In response to this computational argument for discharge, the

IRS said that in calculating the three-year period under section 507, the court should exclude the period during which the Chapter 13 automatic stay had prevented the IRS from collecting the Youngs' tax debt; if this is done, the elapsed delay is well under three years.

Following the majority view among the divided authorities, the bankruptcy court agreed with the IRS that the three-year period in section 507 should be tolled during the period of the prior automatic stay. The district court affirmed, saying that the better reasoned decisions supported this result. The Youngs now appeal to this court. The issues, which turn solely on the law, are considered de novo in this court. Martin v. Bajgar (In re Bajgar), 104 F.3d 495, 497 (1st Cir. 1997).

Prior to 1966, no tax debt was discharged by bankruptcy. 11 U.S.C. § § 35(a)(1), 104(a)(4) (1964). The ability of the IRS to recover unpaid taxes was constrained only by the statute of limitations requiring (exceptions aside) assessment within three years of the return's filing, and collection within six years (now ten years) of assessment. 26 U.S.C. § § 6501-02 (1964 & 1994). In 1966, Congress amended the Bankruptcy Code to strike a new balance between government revenue needs and the "fresh start" objectives of the bankruptcy laws. Pub. L. No. 89-496, § 2, 80 Stat. 270 (1966) (codified at 11 U.S.C. § 35 (Supp. V 1970)); S. Rep. No. 1158 (1966), reprinted in 1966 U.S.C.C.A.N. 2468, 2469-72. Taxes were made dischargeable under Chapter 7 but subject to a three-year "lookback" provision which, ignoring exceptions not relevant here, read as follows:

> A discharge in bankruptcy shall release a bankrupt from all of his provable debts . . . except ... taxes which became legally due and owing by the bankrupt . . . within three years preceding bankruptcy . . . .

11 U.S.C. § 35(a) (Supp. V 1970).

This provision did not affect claims of the government that were secured by liens that the IRS obtained prior to bankruptcy through IRS levies or court proceedings to collect past taxes. S. Rep. No. 1158, reprinted in 1966 U.S.C.C.A.N. at 2470. The new three-year lookback limitation, said Congress, would "induce taxing authorities to act to prevent large accumulations of tax claims," curbing the past practice of allowing them "to accumulate and remain unpaid for long periods of time." Id. at 2471. Thus, even under the new scheme, the government could effectively protect itself as to all tax claims by acting promptly.[2]

In the Bankruptcy Reform Act of 1978, Pub. L. 95-598, 92 Stat. 2549 (codified at 11 U.S.C. § § 101-1330 (1994)), Congress revised the 1966 amendments in various ways. Notably, it split the relevant discharge provision into the two sections described above (sections 727(b) and 523(a)(1)(A)); it fine-tuned the three-year period to begin with

---

[2] If the IRS assessed and obtained liens within three years of a tax due date, taxes due more than three years prior to a bankruptcy petition would be secured through liens; and although a bankruptcy petition would automatically stay assessment and collection of any new taxes, the three-year lookback provision would prevent discharge as to them.

the date of the return instead of the due date of the taxes, 11 U.S.C. § 507(a)(8)(A)(i); and it added a new exception to dischargeability for taxes assessed within 240 days before the filing of a bankruptcy petition, 11 U.S.C. § 507(a)(8)(A)(ii). But details aside, there is no indication that Congress intended to alter the three-year lookback compromise struck in 1966.

Against this background, the issue on this appeal is readily framed. The Youngs rely on the language of the present Bankruptcy Code and say correctly that a plain language reading favors their position. The IRS claim for their unpaid 1992 taxes was never secured and so is dischargeable in bankruptcy unless excepted by the three-year lookback provision. And, literally read, the three-year lookback provision does not apply to the Youngs because the tax return in question was filed more than three years prior to the Youngs' Chapter 7 bankruptcy petition.

The IRS, by contrast, urges that the three-year lookback period be tolled--that is to say, extended--by excluding the period during which the Youngs were in Chapter 13 proceedings. During this period, the IRS could not make collection efforts based on its prior assessment against the Youngs for their 1992 taxes; and given the overlap of the two automatic stays obtained by the Youngs, the IRS never got the three-year period that Congress intended to provide it to assess and collect the 1992 taxes. This, says the IRS, frustrates the original compromise embodied in the statute and opens the way to taxpayer manipulation.

Congress has adopted tolling provisions to deal with related problems elsewhere in the Bankruptcy and Tax

Codes;[3] indeed, there is a tolling provision of a specialized kind built into the companion 240-day assessment period added to section 507(a)(8)(A)(ii) in 1978. But the inferences from the presence of these express provisions more or less cancel out: the IRS gets some support from underlying policies in favor of tolling adopted in these different situations, while the Youngs can say that Congress's express provisions show that it knew how to add tolling provisions when it wished to do so, see Keene Corp. v. United States, 508 U.S. 200, 208 (1993) (using the canon of inclusio unius).

The truth is that Congress appears never to have thought about the precise problem posed by the Youngs' successive petitions. Had it done so, it is a very safe guess that it would have adopted a tolling provision of some sort to protect the IRS. The IRS's policy arguments, based on the original 1966 compromise and the threat of manipulation, are strong ones, and the Youngs have no serious counter-arguments based on policy; they rely mainly on literal language and the impropriety of courts rewriting statutes. This last point is the nub of the matter.

If Congress imposed a new tax on two classes of taxpayers and patently omitted a third comparable class only through oversight, a court could not properly read the third class into the tax statute, however confident judges might be

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[3] 11 U.S.C. § 108(c) (extending nonbankruptcy statutes of limitation for creditors when they are barred by the Bankruptcy Code from taking action against a debtor); 26 U.S.C. § 6503(h) (extending the statutes of limitation for the IRS's assessment and collection of taxes while it is stayed by the Bankruptcy Code from pursuing a debtor).

about what Congress would have done if it had thought of the defect. Yet courts have been far more ready to interpolate solutions into statutes where the concern is with ancillary matters such as remedies, exhaustion requirements, time period calculations, retroactivity, and estoppel. Such matters are usually subordinate to Congress's main concerns, and courts often have prior expertise or existing doctrine in point.

The category most apt in this case is that of statutes of limitations. Ordinarily, such limitations periods are fixed tersely by statute, but an apparatus of judge-made tolling doctrine has been superimposed on such statutes. Developments in the Law--Statutes of Limitations, 63 Harv. L. Rev. 1177, 1220-35 (1950). The three-year lookback provision is akin to a statute of limitations--it preserves recent claims against discharge and cuts off older ones--and we think that courts retain the same freedom here to assure that the underlying aims of Congress are not frustrated by conduct that thwarts the compromise enacted in 1966.

Virtually all of the circuit cases dealing with successive bankruptcy petitions and the three-year lookback provision have chosen to supplement the statute; the only difference between the judges is how to do it. The most common rule, adopted by five circuits, is that the lookback period is automatically tolled during a prior bankruptcy.[4]

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[4] Waugh v. IRS (In re Waugh), 109 F.3d 489, 491-93 (8th Cir.), cert. denied, 522 U.S. 823 (1997); In re Taylor, 81 F.3d 20, 22-24 (3d Cir. 1996); West v. United States (In re West), 5 F.3d 423, 426-27 (9th Cir. 1993), cert. denied, 511 U.S. 1081 (1994); United States v. Richards (In re Richards), 994 F.2d 763, 765-66 (10th Cir. 1993); Montoya v. United States (In re

These courts differ only in using different analogies or arguments to support the rule; four borrow from some combination of tolling provisions elsewhere in the Bankruptcy and Tax Codes, see note 3 above, while the Tenth Circuit relies on the general equitable powers of bankruptcy courts under 26 U.S.C. § 105(a).

By contrast, three other circuits have held that the lookback period is not automatically tolled by a prior bankruptcy proceeding but that equitable considerations may permit tolling on a case-by-case basis. The Eleventh Circuit states that the equities will usually favor the government, Morgan v. United States (In re Morgan), 182 F.3d 775, 779-80 (11th Cir. 1999); the Sixth seems to require a showing of debtor misconduct, Palmer v. United States (In re Palmer), 219 F.3d 580, 585 (6th Cir. 2000); and the Fifth agnostically demands a "[f]ull development and examination of the facts," Quenzer v. United States (In re Quenzer), 19 F.3d 163, 165 (5th Cir. 1993).

We follow the majority view in favor of automatic tolling. In some cases, the equities alone might justify tolling, but the automatic tolling rule rests on a broader basis: it preserves for the government the benefit of the 1966 compromise by giving it the full three years to assess and collect taxes. The taxpayer is faced with "old" tax claims only if he or she has chosen to make back-to-back bankruptcy filings. And, as a final, although less important benefit, automatic tolling is infinitely easier and more predictable to administer.

Montoya), 965 F.2d 554, 557-58 (7th Cir. 1992).

Some might think that to make up for omissions in statutes will only encourage careless drafting and that serious gaps can always be filled by congressional amendment. Others might argue that in an age of numerous and complex enactments, lawmakers should expect that common law judges will use their traditional skills to support legislation. As usual, it is a matter of striking the right balance, and it comforts us to know that all circuits that have ruled on the matter agree that some judge-made tolling adjustment is required for section 507(a)(8)(A)(i).

The judgment of the district court is affirmed. Each side will bear its own costs on this appeal.

It is so ordered.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 00-1484

IN RE: CORNELIUS P. YOUNG)
and SUZANNE P. YOUNG,)
Debtors.)
)
CORNELIUS P. YOUNG)
and SUZANNE P. YOUNG,)
Debtors, Appellants,)
)
v.)
)
UNITED STATES OF AMERICA,)
Appellee.)
)
VICTOR DAHAR,)
Trustee.)

ERRATA

The opinion of this court issued on December 1, 2000, is amended as follows:

One page 8, second full paragraph, line 6, replace the word "omissions" with the word "solutions".

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

[Filed March 20, 2000]

Civil No. 99-325-M

Cornelius P. Young; and Suzanne P. Young, *Appellants*	)
v.	)
United States of America, *Appellee*	)

ORDER

The issue presented in this appeal from the bankruptcy court is straight-forward: whether federal income tax assessments due more than three years before appellants' successive bankruptcy filing should be discharged. The bankruptcy court (Vaughn, C.J.) determined that the tax debt was not dischargeable because the three year period allowed the Internal Revenue Service to collect taxes under 11 U.S.C. §§ 523 (a) (1) (A) and 507 (a) (8) (A) (i) was tolled during the pendency of appellants' earlier Chapter 13 proceeding, during

which the IRS was statutorily precluded from taking collection action. See 11 U.S.C. § 362 (a); 26 U.S.C. § 6503 (h).

While there is a minor split of authority, the decided majority, and better reasoned, approach is that articulated by Chief Judge Vaughn. There is no reason to add to the decision appealed from beyond saying it is affirmed for the reasons given. See In re Avila, 228 B.R. 63, 66 n.3 (Bankr.D.Mass. 1999) (collecting cases).

Conclusion

The decision of the bankruptcy court granting summary judgment to the appellee is affirmed.

SO ORDERED.

/s/
Steven J. McAuliffe
United States District Judge

March 20, 2000

cc: Grenville Clark, III, Esq.
Joseph L. Meadows, Esq.
Victor Dahar, Esq.
George Vannah

APPENDIX D

UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF NEW HAMPSHIRE

[Filed May 5, 1999]

Bk. No. 97-10848-MWV,
Chapter 7, Adv. No. 98-1096-MWV

IN RE: CORNELIUS P. YOUNG)
and SUZANNE P. YOUNG,)
Debtors)
CORNELIUS P. YOUNG)
and SUZANNE P. YOUNG,)
Plaintiffs,)
)
v.)
)
UNITED STATES OF AMERICA,)
INTERNAL REVENUE SERVICE)
Defendant.)

MEMORANDUM OPINION

The Court has before it the United States of America, Internal Revenue Service's ("Defendant") motion for summary judgment requesting that the Court order that the tax debt owed the Defendant by Cornelius P. and Suzanne P. Young ("Plaintiffs") is not excepted from discharge. The

Defendant's motion alleges that the three-year nondischargeability period for income taxes was tolled during the Plaintiffs' prior bankruptcy. The Plaintiffs object, alleging that the plain meaning of section 507(a)(8)(A)(1) of the Bankruptcy Code is clear and does not lead to absurd results when taken in conjunction with section 523(a)(1); thus, the Plaintiffs allege that their prior bankruptcy filing did not toll the statutory period. For the reasons stated below, the Defendant's motion for summary judgment is granted.

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. § § 1334 and 157(a) and the "Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire," dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

FACTS

On October 15, 1993, the Plaintiffs herein filed their 1992 federal income tax returns, which the the Internal Revenue Service assessed on January 3, 1994. The Plaintiffs did not sign an offer in compromise, but paid the Internal Revenue Service monthly installment payments from April 1994 to November 1995. The Plaintiffs filed for Chapter 13 bankruptcy on May 1, 1996.[1] During their Chapter 13 case, the Plaintiffs filed a reorganization plan, which provided for payment of the remainder of the amount owed the Defendant. The Internal Revenue Service filed a proof of claim, which it amended on September 20, 1996. The amended proof of

[1] The case number is 96-1180-MWV.

claim set forth a priority claim of $12,736.17 and a non-priority claim of $4,933.87. The Plaintiffs' plan was not confirmed. Thereafter, the Plaintiffs filed a voluntary notice of dismissal and their Chapter 13 case was dismissed on March 13, 1997.[2]

The Plaintiffs filed for Chapter 7 bankruptcy on March 12, 1997, and were granted a discharge on June 17, 1997. On September 22, 1997, their case was closed. However, on July 13, 1998, the Plaintiffs herein reopened their Chapter 7 case to file a complaint to determine the dischargeability of the 1992 income tax obligation. In their complaint, the Plaintiffs seek a declaration that their 1992 assessed federal income tax liability, which they reported on October 15, 1993, should be excepted from discharge pursuant to section 507(a)(8)(A) of the Bankruptcy Code because it became due more than three years before they filed for Chapter 13. The Defendant disagrees and asserts that its right to collect taxes was tolled during the Plaintiffs' Chapter 13 filing, and that the Plaintiffs should not be able to discharge this debt by filing Chapter 7 before the IRS could commence collection.

DISCUSSION

Under Rule 56(c) of the Federal Rules of Civil Procedure, made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7056, a summary judgment

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[2] In case number 96-11180-MWV, the Debtors' notice of voluntary dismissal was filed October 23, 1996, the Trustee filed his report on February 2, 1997, and the case was closed on March 13, 1997.

motion should be granted only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." "Genuine," in the context of Rule 56(c), "means that the evidence is such that a reasonable jury could resolve the point in favor of the nonmoving party." Rodriguez-Pinto v. Tirado-Delgado, 982 F.2d 34, 38 (1st Cir. 1993) (quoting United States v. One Parcel of Real Property, 960 F.2d 200, 204 (1st Cir. 1992)). "Material," in the context of Rule 56(c), means that the fact has "the potential to affect the outcome of the suit under applicable law." Nereida-Gonzalez v. Tirado-Delgado, 990 F.2d 701, 703 (1st Cir. 1993). Courts faced with a motion for summary judgment should read the record "in the light most flattering to the nonmovant and indulg[e] all reasonable inferences in that party's favor." Maldonado-Denis v. Castillo-Rodriguez, 23 F.3d 576, 581 (1st Cir. 1994).

The issue in dispute revolves around the construction of various Bankruptcy Code statutes. There are no material facts in dispute. Section 523(a)(1)(A) of the Bankruptcy Code states that taxes are not discharged if they are "of the kind and for the periods specified in section . . . 507(a)(8)(A) of this title, whether or not a claim for such tax was filed or allowed." 11 U.S.C.A. § 523(a)(1)(A) (1988 & Supp. 1998). Thus, section 507(a)(8)(A) determines whether section 523(a)(1)(A) is to have effect.

Section 507(a)(8)(A) states, in pertinent part:

(a) The following expenses and claims have priority in the following order:

> (8) Eighth, allowed unsecured claims of governmental units, only to the extent that such claims are for--
>
> (A) a tax on or measured by income or gross receipts--
>
> (i) for a taxable year ending on or before the date of the filing of the petition for which a return, if required, is last due, including extensions, after three years before the date of the filing of the petition . . . .

11 U.S.C.A. § 507(a)(8)(A) (1988).

Statutes are to be followed to the literal letter, unless doing so would yield absurd results not intended by their drafters. See United States v. Ron Pair Enters., Inc., 489 U.S. 235 (1989) (the plain meaning of a statute controls); United States v. Rippetoe, 178 F.2d 735 (4th Cir. 1949) (citing United States v. American Trucking Ass'n, 310 U.S. 534, 543 (1940) ("[A]ll laws are to be given a sensible construction and that a literal application of language which leads to absurd consequences should be avoided whenever a reasonable application can be given consistent with the legislative purpose.") (other citations omitted).

The Defendant does not dispute, were no tolling to apply, that the taxes at issue became due more than three years prior to the filing of the Plaintiffs' second bankruptcy petition, and would thus be discharged. However, the

Defendant does assert that if this Court looks only to section 507(a)(8)(A), which does not provide for tolling, discharging its debt would frustrate Congressional intent to give taxes priority under the Bankruptcy Code. (See Def.'s Mem. at 3-5.)

The Court agrees and holds that the Defendant's right to collect taxes was tolled during the pendency of the Plaintiffs' first Chapter 13 case. In doing so, this Court follows the well reasoned decisions in this circuit, as well as others, that the Internal Revenue Code's tolling provision tolls the Bankruptcy Code's three-year priority period under section 507(a)(8)(A). See 11 U.S.C.A. § 108(c) (1988 & Supp. 1998) (a creditor may commence an action against the debtor thirty days subsequent to either the end of the automatic stay or the statutory limitations period); 26 U.S.C.A. § 6503 (1982 & Supp. 1998) (Section 6503(b) of the Internal Revenue Code suspends the collection of taxes for any period the taxpayer's assets "are in the control or custody of the court in any proceeding before any court of the United States . . . and for six months thereafter."); Waugh v. Internal Revenue Serv. (In re Waugh), 109 F.3d 489 (8th Cir. 1997); In re Taylor, 81 F.3d 20 (3rd Cir. 1996); West v. United States (In re West), 5 F.3d 423 (9th Cir. 1993); United States v. Richards (In re Richards), 994 F.2d 763 (10th Cir. 1993); Montoya v. United States (In re Montoya), 965 F.2d 554 (7th Cir. 1992); Palmer v. Internal Revenue Serv. (In re Palmer), 228 B.R. 880 (B.A.P. 6th Cir. 1999); Pagnac v. Minnesota Dep't of Revenue (In re Pagnac), 228 B.R. 219 (B.A.P. 8th Cir. 1998); Brickley v. United States (In re Brickley), 70 B.R. 113, 115 (B.A.P. 9th Cir. 1986) ("it is clear that Congress, by enacting Section 108(c), intended to activate Section 6503(b) and thereby suspend the running

of the statute of limitations for tax collection during a taxpayer's bankruptcy proceeding"); In re Pastula, 203 B.R. 941 (Bankr. E.D. Mich.) (holding that three-year priority period was not suspended), rev'd, 227 B.R. 794 (E.D. Mich. 1997); In re Eysenbach, 183 B.R. 365 (W.D.N.Y. 1995); In re Avila, 228 B.R. 63 (Bankr. D. Mass. 1999); Daniel v. United States (In re Daniel), 227 B.R. 675 (Bankr. N.D. Ind. 1998); Fontes v. United States (In re Fontes), 228 B.R. 3 (Bankr. N.D. Ala. 1998); Zecco v. United States (In re Zecco), 211 B.R. 109 (Bankr. D. Mass. 1997). Cf. Quenzer v. United States (In re Quenzer), 19 F.3d 163 (5th Cir. 1993) (tolling could not be used to toll priority period for collection of taxes).

The Court also finds that to discharge this debt by simply following the literal construction of sections 507(a)(8)(A) and 523(a)(1)(A) would be an absurd consequence unintended by Congress and would allow debtors to manipulate the bankruptcy system. See Brickley, 70 B.R. at 115 ("The Debtors' argument that the Internal Revenue Service failed to collect its taxes within the three-year period of nondischargeability ignores the fact that their property was unreachable during most of that time."). Although the Court imputes no bad faith on the Plaintiffs, it is worth noting that the Defendant's claim was to be paid in full under the Plaintiffs' Chapter 13 plan. Were the Court to allow this debt to be discharged, debtors could easily propose a plan to pay the Internal Revenue Service's claim in full under Chapter 13, dismiss their Chapter 13 case and file Chapter 7 to discharge the tax debt. Such an easy loophole cannot be allowed.

Congress enacted section 108 to "protect the right of governmental units (and other creditors) to collect debts

which are not discharged in the bankruptcy proceeding." S. REP. NO. 95-989 at 15 (1978), reprinted in 1978 U.S.C.C.A.N. 5787. Further, section 108 contemplates Internal Revenue Code section 6503(b). See § 108; S. REP. NO. 95-989 at 30-31 (1978), reprinted in 1978 U.S.C.C.A.N. 5787. In granting the Defendant's motion for summary judgment, this Court follows the reasoning of Zecco v. United States, in which Judge Hillman wrote:

> Absence of tolling would permit a scenario where a tax debtor could file a petition under Title 11 and allow the automatic stay to consume much or all of the three year period, then dismiss or otherwise terminate the earlier case and file anew, more than three years after the original assessment, and obtain discharge from the tax liabilities. This would not be a desirable conclusion . . . . [T]he court, in expounding a statute, [will not] give to it a construction which would in any degree disarm the government of a power which would enable individuals to embarrass it, in the discharge of the high duties it owes to the community--unless plain and express words indicated that such was the intention of the Legislature. . . ."

Zecco, 211 B.R. at 109 (citing Brown v. Duchesne, 60 U.S. 183, 194-95 (1956)) (internal quotations omitted). Under the scenario of the present case, allowing this tax debt to be discharged would circumvent wholly the IRS's three-year time period in which to collect taxes. It is clear that Congress intended the IRS to be granted three years to collect taxes,

after which a tax debt could be discharged. § 507(a)(8)(A). Therefore, summary judgment is granted in favor of the Defendant.

This opinion constitutes the Court's findings and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue a separate order consistent with this opinion.

DATED this 5th day of May, 1999, at Manchester, New Hampshire.

/s/_____
Mark W. Vaughn
Chief Judge

Supreme Court, U.S.
FILED
JUN 11 [redacted]
OFFICE OF THE CLERK

No. 00-1567

In the Supreme Court of the United States

CORNELIUS P. YOUNG AND SUZANNE P. YOUNG,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the three-year lookback period for determining the priority and nondischargeability of taxes pursuant to Sections 507(a)(8)(A)(i) and 523(a)(1)(A) of the Bankruptcy Code, 11 U.S.C. 507(a)(8)(A)(i), 523(a)(1)(A), is tolled during the pendency of a debtor's prior bankruptcy case.

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In the Supreme Court of the United States

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 233 F.3d 56. The opinion of the district court (Pet. App. 12a-13a) is unofficially reported at 2000-2 U.S. Tax Cas. (CCH) ¶ 50,522. The opinion of the bankruptcy court (Pet. App. 14a-22a) is unofficially reported at 99-1 U.S.Tax Cas. (CCH) ¶ 50,553.

JURISDICTION

The judgment of the court of appeals was entered on December 1, 2000. The petition for a writ of certiorari was filed on March 1, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

In addition to Sections 507, 523 and 727 of the Bankruptcy Code, 11 U.S.C. 507, 523 (1994 & Supp. V 1999), 727, which are set forth in relevant part at Pet. 1-3, the following statutes are involved in this case:

1. 11 U.S.C. 105(a) provides, in relevant part:

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. * * *

2. 11 U.S.C. 108(c) provides, in relevant part:

> Except as provided in section 524 of this title, if applicable nonbankruptcy law * * * fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor, * * * and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of—
>
> (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or
>
> (2) 30 days after notice of the termination or expiration of the stay under section 362 * * * of this title * * * with respect to such claim.

3. 11 U.S.C. 362(a) provides, in relevant part:

> Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title * * * operates as a stay, applicable to all entities, of—

> (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title * * * .

4. 26 U.S.C. 6503(h) provides, in relevant part:

> The running of the period of limitations provided in section 6501 or 6502 [of the Internal Revenue Code] on the making of assessments or collection shall, in a case under title 11 of the United States Code, be suspended for the period during which the Secretary is prohibited by reason of such case from making the assessment or from collecting * * * .

STATEMENT

1. a. Petitioners requested and obtained an extension of time for filing their 1992 federal income tax return until October 15, 1993. They filed their return within that extended period but did not pay the amount that they acknowledged was due. Pet. App. 16a. The United States was able to collect only a portion of these past-due taxes before May 1, 1996. On that date, petitioners filed a petition for relief under Chapter 13 of the Bankruptcy Code. *Id.* at 2a. Upon the commencement of that bankruptcy case, the United States was barred by the "automatic stay" imposed under Section 362(a)(6) of the Bankruptcy Code from taking "any act to collect" the remaining unpaid taxes. 11 U.S.C. 362(a)(6). At the same time, the statute of limitations for the collection of these taxes was "suspended for the period during which" the automatic stay remained in effect. 26 U.S.C. 6503(h).

Every plan for administration of a Chapter 13 bankruptcy case must include a provision for making pay-

ment in full of the tax claims that are "priority" claims under Section 507 of the Bankruptcy Code. 11 U.S.C. 1322(a)(2). The tax claims given "priority" under Section 507 include income taxes for tax years for which the return was due (including extensions) no more than "three years before the date of the filing of the [bankruptcy] petition." 11 U.S.C. 507(a)(8)(A)(i) [hereinafter referred to as the "three-year lookback period" of Section 507(a)(8)]. Because petitioners' Chapter 13 bankruptcy case was filed less than three years after October 15, 1993—when their tax return for the 1992 tax year was due—petitioners were required to submit a Chapter 13 plan that provided for full payment of the government's claim. Pet. App. 15a.

b. Although petitioners submitted such a Chapter 13 plan, they thereafter failed to seek or obtain confirmation of that plan. Pet. App. 16a. Instead, on October 23, 1996 (eight days after the three-year lookback period of Section 507(a)(8) expired), petitioners filed a notice of dismissal of their Chapter 13 bankruptcy case. That dismissal was filed under the provision of Chapter 13 that authorizes debtors to dismiss their cases voluntarily at any time. *Id.* at 2a; see 11 U.S.C. 1307(b). When (as here) such a dismissal occurs before a plan is confirmed in a Chapter 13 case, any payments that have been made by the debtors to the Chapter 13 trustee are returned to the debtors. 11 U.S.C. 1326(a)(2). As a result, nothing was paid to the United States from the aborted Chapter 13 proceeding.

2. Just before the formal order dismissing the Chapter 13 bankruptcy case was entered by the bankruptcy court, however, petitioners filed a second petition for relief in bankruptcy. Pet. App. 16a. The second petition was filed under Chapter 7 of the Bankruptcy Code. Chapter 7, unlike Chapter 13, does

not require full payment of priority tax claims. Instead, priority tax claims that are not paid in a Chapter 7 case are excepted from the discharge obtained by the debtor under Section 523(a)(1)(A) of the Bankruptcy Code. 11 U.S.C. 523(a)(1)(A); see 11 U.S.C. 727(b). When, as here, the Chapter 7 case makes no provision for payment of priority taxes, the government is free to seek collection of these taxes upon the expiration of the automatic stay of the bankruptcy case.

In the present case, the government sought to collect the outstanding taxes owed by petitioners following the completion of the Chapter 7 case. In response, petitioners sought a determination from the bankruptcy court that the taxes they owe for their 1992 tax year were discharged in the Chapter 7 case. Pet. App. 16a. Petitioners asserted that these taxes were discharged in that second bankruptcy case because, (i) by the time that case was commenced (in 1997), more than three years had elapsed since the return for the 1992 tax year was due and that, (ii) as a result, the 1992 taxes were not "priority" taxes under Section 507(a)(8) and, (iii) that these taxes therefore were not excepted from discharge under Section 523(a)(1)(A).

3. a. The bankruptcy court rejected petitioners' contention. Pet. App. 14a-22a. The court agreed with the government that the taxes for 1992 were not discharged by the second bankruptcy case because the three-year lookback period under Section 507(a)(8) was tolled during the period in which the automatic stay was in effect during the first bankruptcy case. The court explained that the three-year lookback period of Section 507(a)(8) operates as a statute of limitations and is tolled by the provisions of the Bankruptcy Code and Internal Revenue Code that extend the statutes of limitations for collection of tax claims during the period

that the automatic stay is in effect. *Id.* at 19a (citing 11 U.S.C. 108(c); 26 U.S.C. 6503(b)). The court adopted the "well reasoned" decisions of the numerous courts that have concluded that the three-year lookback provisions of Section 507(a)(8) are tolled in these circumstances. Pet. App. 19a (citing, *e.g.*, *In re Waugh*, 109 F.3d 489 (8th Cir.), cert. denied, 522 U.S. 823 (1997); *In re Taylor*, 81 F.3d 20 (3d Cir. 1996); *In re West*, 5 F.3d 423 (9th Cir. 1993), cert. denied, 511 U.S. 1081 (1994); *In re Montoya*, 965 F.2d 554 (7th Cir. 1992)). The court emphasized that any other conclusion would result in "an absurd consequence unintended by Congress and would allow debtors to manipulate the bankruptcy system." Pet. App. 19a, 20a. Because the 1992 taxes thus remained priority taxes in the second bankruptcy case, the court held that these taxes were not discharged at the conclusion of that case and that the government's collection activities were therefore proper. *Id.* at 21a-22a.

b. The district court upheld the bankruptcy court's ruling. Pet. App. 12a-13a. The court noted that, "[w]hile there is a minor split of authority, the decided majority, and better reasoned, approach is that articulated by" the bankruptcy court in this case. *Id.* at 13a.

4. The court of appeals affirmed. Pet. App. 1a-11a. The court concluded that, even in the absence of an express statutory provision tolling the three-year lookback period of Section 507(a)(8) during the period of the automatic stay of a prior bankruptcy, courts may adopt a tolling rule "to assure that the underlying aims of Congress are not frustrated by conduct that thwarts" the plain purpose of the statute. *Id.* at 8a. The court noted that "[v]irtually all of the circuit cases dealing with successive bankruptcy petitions and the three-year lookback provision have chosen to supplement the statute" with a judge-made tolling rule, and that "[t]he most common rule, adopted by five circuits, is that the lookback period is automatically tolled during a prior bankruptcy." *Ibid.* (citing *In re Waugh*, *supra*; *In re Taylor*, *supra*; *In re West*, *supra*; *In re Montoya*, *supra*; and *In re Richards*, 994 F.2d 763 (10th Cir. 1993)). The court observed that "three other circuits have held that the lookback period is not automatically tolled by a prior bankruptcy proceeding but that equitable considerations may permit tolling on a case-by-case basis." *Id.* at 9a (citing *In re Palmer*, 219 F.3d 580 (6th Cir. 2000); *In re Morgan*, 182 F.3d 775 (11th Cir. 1999); *In re Quenzer*, 19 F.3d 163 (5th Cir. 1993)). The court concluded, however, that it should "follow the majority view in favor of automatic tolling," for that rule avoids "taxpayer manipulation" of the bankruptcy process and preserves the "full three years" that Congress gave the government "to assess and collect taxes." *Id.* at 6a, 9a.

ARGUMENT

The courts of appeals acknowledge that they are in direct conflict on the question presented in this case. As the First Circuit explained in its decision below, six of the courts of appeals have now concluded that the priority of federal taxes in a second-filed bankruptcy case may not be avoided by the voluntary filing and dismissal of the taxpayer's first bankruptcy proceeding. Three other courts of appeals, however, have adopted the view that the facts and circumstances of each separate case are to be considered in applying an equitable tolling rule to the three-year lookback period of Section 507(a)(8). Although the courts of appeals have consistently recognized that granting a discharge in the

second case would yield a result that Congress did not intend, they have disagreed as to the circumstances that justify tolling of the lookback period. Different rules have thus been applied to reach disparate results in different circuits.

The question presented in this case arises with considerable frequency. Indeed, the use of successive bankruptcy petitions in an effort to avoid tax obligations has become such a widely known and commonly employed device that more than 150 cases are currently pending that present this same issue. The present case squarely presents the issue that has divided the circuits and would thus serve as an appropriate vehicle for the Court to resolve this recurring conflict. We therefore do not oppose the granting of the petition in this case.

It is important to note, however, that the House and Senate have passed bills that would resolve this matter prospectively by amending the Bankruptcy Code to provide that the three-year lookback period of Section 507(a)(8) is tolled and extended for any period in which the automatic stay was in effect in a prior bankruptcy case. See H.R. 333, 107th Cong., 1st Sess. § 705 (2001); S. 420, 107th Cong., 1st Sess. § 705 (2001). The provisions of these competing bankruptcy bills, however, have not yet been reconciled in conference. There is thus no guarantee that a bill will be enacted and signed into law either this year or in the foreseeable future.[1] If the pending bankruptcy legislation were hereafter enacted, however, there would no longer be a pressing need for this Court's resolution of the question

[1] A similar legislative solution to this recurring problem was advanced in bills introduced in prior Congresses that were not enacted into law.

presented in this case. Absent such legislation, review by this Court is warranted.[2]

1. a. Sections 523(a)(1)(A) and 727(b) of the Bankruptcy Code provide a discharge for a Chapter 7 debtor of income taxes that do not qualify as "priority" tax claims under Section 507 of the Code. 11 U.S.C. 523(a)(1)(A), 727(b). In turn, Section 507 provides that an income tax claim is not a "priority" claim if it is for a tax year for which the return was due more than three years prior to the filing of the bankruptcy case. 11 U.S.C. 507(a)(8)(A)(i). Under these provisions, a debtor who files under Chapter 7 of the Bankruptcy Code may be discharged from income tax claims for tax years for which the return was due more than three years prior to the commencement of the bankruptcy case. 11 U.S.C. 523(a)(1)(A); see 11 U.S.C. 507(a)(8)(A)(i).

This "three-year lookback rule" was first enacted by Congress in 1966. Prior to 1966, unsecured tax claims had been accorded priority over the claims of other unsecured creditors without regard to when the tax claims accrued. See 11 U.S.C. 35(1), 104(4) (Supp. II 1966); H.R. Rep. No. 687, 89th Cong., 1st Sess. 2 (1965); S. Rep. No. 1158, 89th Cong., 2d Sess. 2 (1966). Prior to the 1966 amendments, tax claims were also nondischargeable in bankruptcy regardless of their age. S. Rep. No. 1158, *supra*, at 2. Congress became concerned, however, that tax claims were allowed to "accumulate and remain unpaid for long periods of time." *Id.* at 4. This meant that the debtor's "fresh start" could be burdened with "what may be an overwhelming liability for accumulated taxes." *Id.* at 2. Congress thus determined in 1966 that it was necessary

[2] We will endeavor to inform the Court if relevant legislative developments occur during the pendency of this case.

to put "some time limit upon the extent of taxes excepted from discharge," as well as on the time period for which tax claims would retain priority over the claims of other creditors. *Id.* at 2, 4. In doing so, however, Congress emphasized that it did not intend to "create a tax evasion device" or unduly impair the effectiveness of the government's tax collection efforts. *Id.* at 3-4.

The balance that Congress struck—the three-year lookback period for the priority and nondischargeability of tax claims now set forth in Section 507(a)(8) of the Bankruptcy Code—was chosen to balance these competing interests. *In re Waugh*, 109 F.3d at 492. In particular, Congress specifically sought to avoid "[a]n open-ended dischargeability policy [that] would provide an opportunity for tax evasion through bankruptcy, by permitting discharge of tax debts before a taxing authority has an opportunity to collect any taxes due." *Ibid.* (quoting H.R. Rep. No. 595, 95th Cong., 1st Sess. 190 (1977)).

b. Many debtors have recently claimed, however, that a loophole exists in the three-year lookback rule that permits them to employ successive bankruptcy cases to obtain a discharge of their income tax debts before the government has had a full three-year period to collect the unpaid taxes. The debtors' theory involves the filing of multiple bankruptcy cases—usually a Chapter 13 bankruptcy followed by a Chapter 7 liquidation. The first bankruptcy is often filed shortly after the government begins to take collection action against the debtor for delinquent taxes. Upon the filing of the first bankruptcy case, the "automatic stay" of Section 362(a) of the Bankruptcy Code bars all collection activity. 11 U.S.C. 362(a). The debtor then maintains the bankruptcy case in place until three years has

elapsed from the due date of his delinquent tax return. The debtor then dismisses the first bankruptcy case (as he is entitled to do in a Chapter 13 case; see 11 U.S.C. 1307(b)) and immediately files a second bankruptcy case. By filing serial bankruptcy cases, the debtor is able to prevent the government from pursuing any collection actions throughout the three-year period that Congress had established for collections. See pages 4-5, *supra*. Unless the three-year lookback period of Section 507(a) is tolled during the first bankruptcy case—as a majority of courts have held it is—a debtor could thus preclude all tax collection efforts and still obtain a discharge of his unpaid taxes in the second bankruptcy case.

2. The question whether debtors can use serial bankruptcy filings in this manner to prevent the collection of taxes during the three-year lookback period has yielded starkly different conclusions in the lower courts. Nine circuits have splintered into several different camps on this issue.

a. The majority of courts—including the court below—have held that the three-year period is automatically tolled during the first bankruptcy case when the debtor files multiple bankruptcy cases. Pet. App. 9a ("We follow the majority view in favor of automatic tolling."); *In re Waugh*, 109 F.3d 489 (8th Cir.), cert. denied, 522 U.S. 823 (1997); *In re Taylor*, 81 F.3d 20 (3d Cir. 1996); *In re West*, 5 F.3d 423 (9th Cir. 1993), cert. denied, 511 U.S. 1081 (1994); *In re Richards*, 994 F.2d 763 (10th Cir. 1993); *In re Montoya*, 965 F.2d 554 (7th Cir. 1992). These courts have relied on the statutes that allow extensions of time for collection of taxes during the period of bankruptcy proceedings (11 U.S.C. 108(c); 26 U.S.C. 6503(c), (h)) and on the clear intent of Congress that, under the three-year lookback rule, the

government is to be allowed sufficient time to collect taxes before they can be discharged in bankruptcy cases.[3] *In re Waugh*, 109 F.3d at 492; *In re Taylor*, 81 F.3d at 23-24; *In re West*, 5 F.3d at 426.[4]

These courts have emphasized that, to interpret these statutes in the manner suggested by the debtors would "defeat the statutory purpose of [both] the Bankruptcy Code [and] the Internal Revenue Code" and "would lead to absurd results, as the government would lose its priority claim to back taxes as a result of the taxpayer's abuse of the bankruptcy process." *In re Taylor*, 81 F.3d at 23. See also Pet. App. 6a; *In re Waugh*, 109 F.3d at 493; *In re West*, 5 F.3d at 425 ("in the rare cases [in which] the literal application of a

[3] The Internal Revenue Code suspends the limitations period for assessing and collecting taxes during the time that a taxpayer is in bankruptcy. 26 U.S.C. 6503(h). In addition, Section 108(c) of the Bankruptcy Code extends nonbankruptcy periods of limitations that had not expired when the bankruptcy case was commenced. 11 U.S.C. 108(c). Several courts have concluded that these statutes apply, by reasonable inference, to the three-year lookback rule of Section 507(a) of the Bankruptcy Code. See *In re Taylor*, 81 F.3d at 23-25; *In re Montoya*, 965 F.2d at 557-558; *In re Waugh*, 109 F.3d at 494 ("11 U.S.C. § 108(c) and 26 U.S.C. § 6503(b) and (h) operate to suspend" the priority period); *In re West*, 5 F.3d at 426-427.

[4] The present case, like the great majority of cases presenting this issue, involves the question whether the three-year lookback period of Section 507(a)(8)(A)(i) should be tolled when a debtor has filed serial bankruptcies. A closely similar question arises with respect to the 240-day lookback period in Section 507(a)(8)(A)(ii) and the two-year lookback period set forth in Section 523(a)(1)(B)(ii). The courts have generally applied the same rule to all three lookback periods. See, *e.g.*, *In re West*, 5 F.3d at 425 (240-day rule is tolled during serial bankruptcy filings); *Richards*, 994 F.2d at 763 (240-day rule); *In re Hollowell*, 222 B.R. 790, 793 (Bankr. N.D. Miss. 1998) (tolling of two-year lookback rule).

statute will produce a result demonstrably at odds with the intentions of its drafters, the intention of the drafters . . ., rather than the strict language, controls.") (internal quotation marks omitted).

The Tenth Circuit has relied on a different rationale in holding that the three-year lookback period of Section 507(a) is always tolled during the pendency of a prior bankruptcy case. That court has held that the suspension of the three-year lookback period is authorized by Section 105(a) of the Bankruptcy Code, which allows the bankruptcy courts to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions" of the Code. 11 U.S.C. 105(a). See *In re Richards*, 994 F.2d at 765. The Tenth Circuit concluded that, in order to accomplish the clear intent of Congress, tolling of this period is always "appropriate to carry out the provisions" of the Code when multiple bankruptcies are employed to preclude the collection of taxes. *Ibid.*

b. Three circuits do not follow the majority rule. *In re Palmer*, 219 F.3d 580 (6th Cir. 2000); *In re Morgan*, 182 F.3d 775 (11th Cir. 1999); *In re Quenzer*, 19 F.3d 163 (5th Cir. 1993)). These courts "have held that the lookback period is not automatically tolled by a prior bankruptcy proceeding but that equitable considerations may permit tolling on a case-by-case basis." Pet. App. 9a. As the court below correctly explained in this case (*ibid.*):

> The Eleventh Circuit states that the equities will usually favor the government [*In re Morgan*, 182 F.3d at 779-780]; the Sixth seems to require a showing of debtor misconduct [*In re Palmer*, 219 F.3d at 585]; and the Fifth agnostically demands a "[f]ull

development and examination of the facts." [*In re Quenzer*, 19 F.3d at 165].

Thus, while these three courts have joined in allowing equitable tolling of the three-year lookback period under Section 105(a) of the Bankruptcy Code, they have done so only when they believe such tolling to be warranted by examination of the particular facts of the case. In evaluating the relevant facts, moreover, they have not followed a single approach in determining when such tolling would be appropriate.

For example, the Eleventh Circuit has suggested that a presumption exists that such tolling will be appropriate in cases in which the debtor's multiple bankruptcies have prevented the government from collecting the outstanding taxes. *In re Morgan*, 182 F.3d at 780. The Fifth Circuit has applied a far more stringent standard. Tolling in that circuit is permitted only when the debtor (i) acted in a calculated manner in dismissing and refiling bankruptcy cases or (ii) consciously employed the automatic stay to shield himself from collection activity. *In re Hollowell*, 222 B.R. 790 (Bankr. N.D. Miss. 1998); *In re Miller*, 199 B.R. 631 (Bankr. S.D. Tex. 1996); *In re Clark*, 184 B.R. 728 (Bankr. N.D. Tex. 1995). The Sixth Circuit has adopted the most restrictive view of tolling. That court concluded that tolling would be appropriate only when the government shows that the debtor committed specific misconduct or intentionally manipulated the bankruptcy process. *In re Palmer*, 219 F.3d at 585, 587 (citing *In re Nolan*, 205 B.R. 885, 888 (Bankr. M.D. Tenn. 1997)).[5]

---

[5] The Eleventh Circuit expressly rejected the standard adopted by the Sixth Circuit, holding that "we reject the notion * * * that a finding of dilatory conduct or bad faith is necessary to find the equities in favor of the government." *In re Morgan*, 182 F.3d at 780 n.8.

3. We thus agree with petitioners that there exists a conflict among the circuits on the question whether the three-year lookback period of 11 U.S.C. 507(a)(8)(A)(i) should be tolled during the pendency of a prior bankruptcy case. We also agree with petitioners that this issue is one that has recently been raised frequently by taxpayers who seek to avoid their tax debts in bankruptcy cases. Unless the curative legislative proposals that are currently pending are enacted by Congress (see page 8, *supra*), resolution by this Court of this recurring question on which the courts of appeals are sharply divided is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 2001

Supreme Court, U.S.
FILED
NOV 9 2001
CLERK

(3)

No. 00-1567

In the Supreme Court of the United States

Cornelius P. Young and Suzanne P. Young,
Petitioners,

v.

United States of America,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

JOINT APPENDIX

GRENVILLE CLARK III
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PETITION FOR WRIT OF CERTIORARI FILED MARCH 1, 2001
CERTIORARI GRANTED SEPTEMBER 25, 2001

39 pp

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Affidavit of Grenville Clark III with attached exhibits 1-7 as follows . . . . . App. 3

Exhibit 1 - IRS transcript of Youngs' 1992 income tax account . . . . . App. 5

Exhibit 2 - Bankruptcy court docket of Youngs' chapter 13 case . . . . . App. 9

Exhibit 3 - Proof of claim filed by IRS in the Youngs' chapter 13 case dated September 4, 1996 . . . . . App. 18

Exhibit 4 - Amended proof of claim filed by the IRS in the Youngs' chapter 13 case dated September 20, 1996 . . . . . App. 23

Exhibit 5 - Youngs' chapter 13 plan . . . . . App. 28

Exhibit 6 - Youngs' request for dismissal of their chapter 13 case dated October 23, 1996 . . App. 32

Exhibit 7 - Bankruptcy court docket of the Youngs' chapter 7 case . . . . . App. 34

RELEVANT DOCKET ENTRIES

May 1, 1996	The Youngs' voluntary chapter 13 bankruptcy petition filed in the United States Bankruptcy Court for the District of New Hampshire (hereafter the "bankruptcy court"). The relevant docket entries of this proceeding are set out at pages App. 9 through App. 17 of this Joint Appendix.
March 12, 1997	The Youngs' voluntary chapter 7 bankruptcy petition filed in the bankruptcy court. The relevant docket entries of this proceeding are set out at pages App. 34 through App. 37 of this Joint Appendix.
July 28, 1998	Complaint to Determine Dischargeability of Federal Income Taxes filed by the Youngs in the bankruptcy Court.
September 3, 1998	United States' Motion for Summary Judgment filed in the bankruptcy court.
October 5, 1998	Plaintiffs' Motion for Summary Judgment filed in the bankruptcy court.
October 5, 1998	Plaintiffs' Objection to United States' Motion for Summary Judgment filed in the bankruptcy court.

May 5, 1999	Memorandum Opinion of the United States Bankruptcy Court for the District of New Hampshire. This Memorandum Opinion has been omitted in the printing of this Joint Appendix because it appears at page 14a in the Appendix to the printed Petition for Certiorari.
May 5, 1999	Final Judgment of the United States Bankruptcy Court for the District of New Hampshire granting the United States' Motion for Summary Judgment.
March 20, 2000	Order of the United States District Court for the District of New Hampshire. This Order has been omitted in the printing of this Joint Appendix because it appears at page 12a of the Appendix to the printed Petition for Certiorari.
March 21, 2000	Judgment of the United States District Court for the District of New Hampshire affirming the bankruptcy court's Final Judgment.
December 1, 2000	Opinion of the United States Court of Appeals for the First Circuit. This Opinion has been omitted in the printing of this Joint Appendix because it appears at page la of the Appendix to the printed Petition for Certiorari.

9710848MWV-8

UNITED STATES BANKRUPTCY COURT DISTRICT OF NEW HAMPSHIRE

In re	Bk. No. 97-10848-MWV
Cornelius P. Young Suzanne P. Young, Debtors	Chapter 7
Cornelius P. Young Suzanne P. Young, Plaintiffs	Adv. No. 98-01096-MWV
vs.	
United States of America (Internal Revenue Service), Defendant	

AFFIDAVIT OF GRENVILLE CLARK III

My name is Grenville Clark III, and upon oath, I depose and say as follows based upon my personal knowledge.

1. I am an attorney-at-law admitted to practice in New Hampshire. I have represented the plaintiffs in this proceeding, C. Paul Young and Suzanne P. Young, in the two bankruptcy cases that they filed in this court, those being the chapter 13 case filed May 1, 1996, no. 96-11180, and the chapter 7 proceeding filed March 12, 1997, no. 97-10848.

2. The exhibits attached to this affidavit are true copies of pleadings or other papers filed in the aforesaid bankruptcy cases or generated by the defendant Internal Revenue Service:

Exhibit 1	IRS transcript of plaintiffs' 1992 income tax account
Exhibit 2	Court docket of plaintiffs' chapter 13 case
Exhibit 3	Proof of claim filed by IRS in plaintiffs' chapter 13 case dated September 4, 1996
Exhibit 4	Amended proof cf claim filed by IRS in plaintiffs' chapter 13 case dated September 20, 1996
Exhibit 5	Debtors' chapter 13 plan
Exhibit 6	Debtors' request for dismissal of their chapter 13 case dated October 23, 1996, and accompanying certificate of service
Exhibit 7	Court docket of plaintiffs' chapter 7 case

October 2, 1998 /s/_____
Grenville Clark III

(Jurat omitted in printing)

IRS EMPLOYEE 0240001919

DATE REQUESTED 12-28-95PRINT DATE 12-31-95

FORM NUMBER: 1040TAX PERIOD: DEC 1992

TAXPAYER IDENFICATION NUMBER: 152-34-9123
SPOUSE TAXPAYER IDENTIFICATION NUMBER:
016-40-7337

C PAUL & SUZANNE R YOUNG
21 HEARTHSIDE CIR
BEDFORD NH 03110-4628-212

---ANY MINUS BELOW SIGNIFIES A CREDIT AMOUNT

ACCOUNT BALANCE: $12,475.23
ACCRUED INTEREST: $2,786.37 AS OF 12-18-95
ACCRUED PENALTY $2,808.07 AS OF 12-18-95

ACCOUNT BALANCE
PLUS ACCRUALS: $18,069.67

**EXEMPTIONS: 05 **FILING STATUS:
MARRIED FILING JOINT
ADJUSTED GROSS INCOME: $161,747.00
TAXABLE INCOME: $115,570.00
TAX PER RETURN: $28,578.00

PER RETURN OR AS ADJUSTED

10-15-93 RETURN DUE DATE OR RETURN RECEIVED

DATE (WHICHEVER IS LATER)
01-03-94 PROCESSING DATE

TRANSACTIONS

CODE	EXPLANATION	DATE	MONEY AMOUNT (IF APPLICABLE)
150	RETURN FILED AND TAX ASSESSED	01-03-94	28,578.00
806	CREDIT FROM WITHELD TAXES & EXCESS FICA	12-15-93	13,476.00-
460	EXTENSION OF TIME FOR FILING TO 08-15-93	04-15-93	
460	EXTENSION OF TIME FOR FILING TO 10-15-93	08-18-93	
960	RECEIVED POA/TIA	10-23-93	
176	PENALTY FOR UNDERPAYMENT OF ESTIMATED TAX	01-03-94	540.69
276	PENALTY FOR LATE PAYMENT OF TAX	01-03-94	679.59
196	INTEREST ASSESSMENT	01-03-94	781.17
290	ADDITIONAL TAX ASSESSMENT	04-04-94	0.00

706	CREDIT APPLIED FROM FORM 1040 TAX PERIOD DEC 1993	04-04-94	178.22-
670	SUBSEQUENT PAYMENT	04-18-94	50.00-
670	SUBSEQUENT PAYMENT	06-13-94	50.00-
670	SUBSEQUENT PAYMENT	07-18-94	50.00-
670	SUBSEQUENT PAYMENT	08-22-94	50.00-
962	UPDATED POA/TIA	08-25-94	
670	SUBSEQUENT PAYMENT	09-14-94	50.00-
670	SUBSEQUENT PAYMENT	10-20-94	260.00-
670	SUBSEQUENT PAYMENT	10-26-94	40.00-
670	SUBSEQUENT PAYMENT	11-21-94	300.00-
670	SUBSEQUENT PAYMENT	12-22-94	300.00-
670	SUBSEQUENT PAYMENT	01-23-95	300.00-
670	SUBSEQUENT PAYMENT	02-23-95	300.00-
670	SUBSEQUENT PAYMENT	03-22-95	300.00-
670	SUBSEQUENT		

	PAYMENT	04-27-95	300.00-
670	SUBSEQUENT PAYMENT	05-27-95	300.00-
670	SUBSEQUENT PAYMENT	07-05-95	300.00-
961	REMOVED POA/TIA	07-19-95	
670	SUBSEQUENT PAYMENT	08-05-95	300.00-
670	SUBSEQUENT PAYMENT	08-18-95	300.00-
670	SUBSEQUENT PAYMENT	09-20-95	300.00-
670	SUBSEQUENT PAYMENT	10-25-95	300.00-
670	SUBSEQUENT PAYMENT	11-24-95	300.00-

U.S. Bankruptcy Court
District of New Hampshire (Manchester)

Bankruptcy Petition #: 96-11180

Date filed: 5/1/96 Date terminated: 6/5/97
Assigned to: Judge James E. Yacos
Chapter 13 voluntary asset joint

* Attorneys *

CORNELIUS PAUL YOUNG
aka
Paul Young
33 Purdue Street
Manchester, NH 03103
SSN: 152-34-9123
* Debtor *

Grenville Clark
Gray, Wendell & Clark
The Center of NH
650 Elm Street
Manchester, NH 03101
603-625-4100

Norene Farr
Normand & Shaughnessy
15 High Street
Manchester, NH 03101
603-624-6655

Thomas Billings
Sally & Pitch, PA
225 Franklin Street
Boston, MA 02110

SUZANNE P. YOUNG
dba
Young Impressions Art Studio
33 Purdue Street
Manchester, NH 03103
SSN: 016-40-7337
* Debtor *

Grenville Clark
(See above)

Norene Farr
(See above)
Norene Farr
(See above)

Thomas Billings
(See above)
Thomas Billings
(See above)

LAWRENCE P. SUMSKI, Trustee
294 Route 101, Unit 7
Amherst, NH 03031
* Trustee *

Proceedings include all events. Closed
96-11180 In re: Cornelius Paul Young and Suzanne P. Young

5/1/96	1	Voluntary Petition missing documents: Statement of Financial Affairs Schedule A - J Unsworn Declaration Disclosure of Aty Compensation Debtors Statement Of Intent Summary of Schedules Chapter 13 Plan ;Chapter 13 Plan due on 5/16/96 Receipt #: 50509 Amount $: 160.00. (kaf) [EOD 05/02/96]

5/1/96	--	First Meeting of Creditors Scheduled For 9:00 6/10/96 At 6th Floor, Room 642 Confirmation Hearing Set For 10:00 11/15/96 At Bankruptcy Courtroom 4th Floor Last day to File Objections to Confirmation: 11/8/96 ;Last Day to File Proofs Of Claim: 9/9/96 (kef) [EOD 05/02/96]
		* * * *
5/3/96	3	Order Directing Service of Notice, Copy of Plan or Summary Thereof sent to Atty Clark (cbc) [EOD 05/03/96]
5/8/96	--	Courts Certificate of Mailing [0-0] First Meeting # of notices: 34. (cbc) [EOD 05/09/96]
		* * * *
5/21/96	5	Notice of Appearance And Request For Service Of Notice By Jonathan M. Flagg for Creditor Citicorp Mortgage, Inc.. (cbc) [EOD 05/21/96]
5/22/96	6	Chapter 13 Plan. (cbc) [EOD 05/22/96]
		* * * *
5/24/96	8	Schedules filed, all schedules and statements. (cbc) [EOD 05/28/96]

5/30/96	9	Certificate Of Service By Grenville Clark for Debtor Suzanne P. Young, Debtor Cornelius Paul Young Of [3-1] Directing Service Order for [6-1] Chapter 13 Plan. (cbc) [EOD 05/3O/96]
6/4/96	10	Notice of Appearance And Request For Service Of Notice By James F. Raymond for Creditor Town of Bedford, NH. (cbc) [EOD 06/04/96]
6/5/96	11	Application By Debtor Cornelius Paul Young, Debtor Suzanne P. Young To Employ Real Estate Broker William Kanteres of Kanteres Real Estate, Inc. (cbc) [EOD 06/05/96]

* * * *

6/12/96	13	First Meeting Held and Examination of Debtor. Date Held 6.10.96. (cbc) [EOD 06/12/96]
6/13/96	14	Motion By Debtor Cornelius Paul Young, Debtor Suzanne P. Young for authority To Sell 21 Hearthside Circle, Bedford (cbc) [EOD 06/13/96]
6/13/96	15	Notice of Hearing-filed by Grenville Clark for Debtor Suzanne P. Young, Debtor Cornelius Paul Young RE: [14-1j Motion To Sell 21 Hearthside

		Circle, Bedford by Suzanne P. Young, Cornelius Paul Young scheduled for 10:00 7/11/96 at Bankruptcy Courtroom 4th Floor (cbc) [EOD 06/13/96]
6/20/96	16	Response By Creditor Citicorp Mortgage, Inc. To [14-1] Motion To Sell 21 Hearthside Circle, Bedford by Suzanne P. Young, Cornelius Paul Young . (cbc) [EOD 06/20/96]

* * * *

7/9/96	19	Consent by Trustee Lawrence P. Sumski To [14-1] Motion To Sell 21 Hearthside Circle, Bedford by Suzanne P. Young, Cornelius Paul Young . (cbc) [EOD 07/09/96]

* * * *

7/11/96	21	Order Granting [11-1] Application To Employ Real Estate Broker William Kanteres of Kanteres Real Estate, Inc. by Suzanne P. Young, Cornelius Paul Young (cbc) [EOD 07/11/96]
7/11/96	22	Order Granting [14-1] Motion To Sell 21 Hearthside Circle, Bedford by Suzanne P. Young, Cornelius Paul Young. (cbc) [EOD 07/11/96]

* * * *

7/30/96	25	Notice of debtors' address change filed by Grenville Clark for Debtor Suzanne P. Young, Debtor Cornelius Paul Young (cbc) [EOD 07/30/96]
9/23/96	26	Application By Debtor Cornelius Paul Young, Debtor Suzanne P. Young To Employ Counsel Norene Farr of Normand & Shaughnessy Law Firm (cbc) [EOD 09/24/96]
9/23/96	27	Notice of Hearing filed by Grenville Clark for Debtor Suzanne P. Young, Debtor Cornelius Paul Young RE: [26-1] Application To Employ Counsel Norene Farr of Normand & Shaughnessy Law Firm by Suzanne P. Young, Cornelius Paul Young scheduled for 9:00 10/4/96 at Bankruptcy Courtroom 7th Floor (cbc) [EOD 09/24/96]
9/30/96	28	Amended [27-1] Hearing Notice Filed by: Grenville Clark for Debtor Suzanne P. Young, Debtor Cornelius Paul Young (cbc) [EOD 09/30/96]

10/4/96	29	Affidavit by Thomas P. Billings, Esq. for [26-1] Application To Employ Counsel Norene Farr of Normand & Shaughnessy Law Firm by Suzanne P. Young, Cornelius Paul Young. Filed in open court. (cbc) [EOD 10/04/96]
10/4/96	30	Order Granting [26-1] Application To Employ Counsel Norene Farr of Normand & Shaughnessy Law Firm by Suzanne P. Young, Cornelius Paul Young (cbc) [EOD 10/04/96]
10/23/96	31	Notice of Voluntary Dismissal filed by Debtor Cornelius Paul Young, Debtor Suzanne P. Young. (cbc) [EOD 10/23/96]
10/28/96	32	Certificate Of Service By Grenville Clark for Debtor Suzanne P. Young, Debtor Cornelius Paul Young Of [31-1] To Dismiss Notice by Suzanne P. Young, Cornelius Paul Young to all creditors. (cbc) [EOD 10/28/96]
10/31/96	33	Notice of Appearance And Request For Service Of Notice By John B. Herron for Creditor American Express Travel Related Svcs. Co. (cbc) [EOD 10/31/96]

11/4/96	34	Application By Trustee Lawrence P. Sumski For Administrative Expenses in the amount of $150. (cbc) [EOD 11/04/96]
11/4/96	35	Notice of Hearing [34-1] Application For Administrative Expenses in the amount of $150. by Lawrence P. Sumski scheduled for 11:00-1/31/97 at Bankruptcy Courtroom 7th Floor (cbc) [EOD 11/04/96]
11/7/96	36	Consent by Debtor Cornelius Paul Young, Debtor Suzanne P. Young To [34-1] Application For Administrative Expenses in the amount of $150. by Lawrence P. Sumski (cbc) [EOD 11/07/96]
11/22/96	37	Notice of Appearance And Request For Service Of Notice By Wendall Livingston for Creditor American Express Travel Svcs. Corp Card. (cbc) [EOD 11/22/96]
1/31/97	38	Order Granting [34-1] Application For Administrative Expenses in the amount of $150. by Lawrence P. Sumski . [EOD 02/04/97]
2/4/97	39	Trustees Final Report and Account upon dismissal of case (cbc) [EOD 02/04/97]

2/6/97	--	Endorsement Order Granting [39-1] Report (cbc) [EOD 02/06/97]
3/13/97	--	Case Closed. (cbc) [EOD 03/14/97]
6/5/97	-	Case Closed. (smp) [EOD 06/05/97]

United States Bankruptcy Court
District of NEW HAMPSHIRE

PROOF OF CLAIM

In Re CORNELIUS PAUL & SUZANNE P. YOUNG
Case Number 96-11180 JEY

NOTE: This from should not be used to make a claim for and administrative expense arising after the commencement of the case. A "request" of payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503.

Department of the Treasury - Internal Revenue Service
Internal Revenue Service
195 Commerce Way, Suite B
PORTSMOUTH, NH 03801
(603) 433-0685

Account or Identifying Numbers: 152-34-9123 and 016-40-7337

1. BASIS FOR CLAIM: X Taxes

2. Date Debt was Incurred: See Attachment

3. If Court Judgment, Date Obtained:

4. Classification of Claim. Under the Bankruptcy Code all claims are classified as one or more of the following (1) Unsecured nonpriority, (2) Unsecured priority, (3) Secured. It is possible for part of a claim to be in one category and part in another.

UNSECURED NONPRIORITY CLAIM $ 17,670.04
A claim is unsecured if there is no collateral or lien on property of the debtor securing the claim or to the extent that the value of such property is less than the amount of the claim.

UNSECURED PRIORITY CLAIM $ 0.00

Taxes or penalties of government units. 11 U.S.C. § 507(a)(8)

TOTAL AMOUNT OF CLAIM AT TIME CASE FILED	$ 17,670.04 (Unsecured)	$ 0.00 (Secured)
	$ 0.00 (Priority)	$ 17,670.04 (Total)

X Check this box if claim includes prepetition charges in addition to the principal amount of the claim. Attach itemized statement of all additional charges.

6. CREDITS AND SETOFFS: The amount of all payments on this claim has been credited and deducted for the purpose of making this proof of claim. In filing this claim, claimant has deducted all amounts that claimant owes to debtor.

7. SUPPORTING DOCUMENTS: *Attach copies of supporting documents*, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, court judgements, or evidence of security interests. If the documents are not available, explain. If the documents are voluminous, attach a summary.

8. TIME-STAMPED COPY: To receive an acknowledgment of the filing of you claim, enclose a stamped, self-addressed envelope and copy of this proof of claim.

09/04/96 /s/
Date Special Procedures Advisor

Penalty for presenting fraudulent claim: Fine of up to $500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

Form 10 Attachment
Department of the Treasury -- Internal Revenue Service

Proof of Claim for Internal Revenue Taxes

In the Matter of:
CORNELIUS PAUL & SUZANNE P YOUNG
21 HEARTHSIDE CIRCLE
BEDFORD, NH 03110

Case Number: 96-11180 JEY
Type of Bankruptcy Case Chapter 13
Date of Petition 05/01/96
Taxpayer Identifying Number
A 152-34-9323
B 016-40-7337

This claim is not subject to any setoff or counterclaim.

Unsecured Priority Claims under section 507(a){8) of the Bankruptcy Code

TIN Ind.	*Kind of Tax*	*Tax Period*	*Date Tax Assessed*
A	Income	12/31/94	07/01/96

Tax Due	*Interest to Petition Date*
$0.00	$0.00

Total Amount of Unsecured Priority Claims: $0.00

Exhibit 3 IRS Proof of Claim - 09/04/96

Unsecured General Claims

TIN Ind.	*Kind of Tax*	*Tax Period*	*Date Tax Assessed*
A	Income	12/31/92	01/03/94

Tax Due	*Interest to Petition Date*
$9,573.78	$3,162.39

Penalty to date of petition on unsecured priority claims (including interest thereon) $15.00

Penalty to date of petition on unsecured general claims (including interest thereon) $4,918.87

Total Amount of Unsecured General Claims: $17,670.04

Exhibit 4 IRS Amended Proof of Claim - 09/20/96

United States Bankruptcy Court
District of NEW HAMPSHIRE

PROOF OF CLAIM

In Re CORNELIUS PAUL & SUZANNE P. YOUNG
Case Number 96-11180 JEY

NOTE: This from should not be used to make a claim for and administrative expense arising after the commencement of the case. A "request" of payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503.

Department of the Treasury - Internal Revenue Service
Internal Revenue Service
195 Commerce Way, Suite B
PORTSMOUTH, NH 03801
(603) 433-0685

Account or Identifying Numbers: 152-34-9123 and 016-40-7337

Check here if this claim: X amends a previously filed claim, dated 09/04/96

1. BASIS FOR CLAIM: X Taxes

2. Date Debt was Incurred: See Attachment

3. If Court Judgment, Date Obtained:

4. Classification of Claim. Under the Bankruptcy Code all claims are classified as one or more of the following (1)

Unsecured nonpriority, (2) Unsecured priority, (3) Secured. It is possible for part of a claim to be in one category and part in another.

UNSECURED NONPRIORITY CLAIM $ 4,933.87
A claim is unsecured if there is no collateral or lien on property of the debtor securing the claim or to the extent that the value of such property is less than the amount of the claim.

UNSECURED PRIORITY CLAIM $ 12,736.17

Taxes or penalties of government units. 11 U.S.C. § 507(a)(8)

5. TOTAL AMOUNT OF CLAIM AT TIME CASE FILED	$ 4,933.87 (Unsecured)	$ 0.00 (Secured)
	$ 12,736.17 (Priority)	$ 17,670.04 (Total)

__X__ Check this box if claim includes prepetition charges in addition to the principal amount of the claim. Attach itemized statement of all additional charges.

6. CREDITS AND SETOFFS: The amount of all payments on this claim has been credited and deducted for the purpose of making this proof of claim. In filing this claim, claimant has deducted all amounts that claimant owes to debtor.

7. SUPPORTING DOCUMENTS: *Attach copies of supporting documents*, such as promissory notes, purchase orders, invoices, itemized statements of running accounts,

contracts, court judgements, or evidence of security interests. If the documents are not available, explain. If the documents are voluminous, attach a summary.

8. TIME-STAMPED COPY: To receive an acknowledgment of the filing of you claim, enclose a stamped, self-addressed envelope and copy of this proof of claim.

09/04/96
Date

/s/
Special Procedures Advisor

Penalty for presenting fraudulent claim: Fine of up to $500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

Form 10 Attachment
Department of the Treasury -- Internal Revenue Service

Proof of Claim for Internal Revenue Taxes

In the Matter of:
CORNELIUS PAUL & SUZANNE P YOUNG
21 HEARTHSIDE CIRCLE
BEDFORD, NH 03110

Case Number: 96-11180 JEY
Type of Bankruptcy Case: Chapter 13
Date of Petition: 05/01/96

Taxpayer Identifying Number

A 152-34-9123
B 016-40-7337

Amendment No. I to Proof of Claim dated 09/04/96

This claim is not subject to any setoff or counterclaim.

Unsecured Priority Claims under section 507(a)(8) of the Bankruptcy Code

TIN Ind.	*Kind of Tax*	*Tax Period*	*Date Tax Assessed*
A	Income	12/31/92	01/03/94
A	Income	23/31/94	07/01/96

Tax Due	*Interest to Petition Date*
$9,573.78	$3,162.39
$ 0.00	$ 0.00

Total Amount of Unsecured Priority Claims: $12,736.17

Unsecured General Claims

Penalty to date of petition on unsecured priority claims (including interest thereon) $4,933.87

Total Amount of Unsecured General Claims: $4,993.87

BGP882130

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

In Re
Cornelius Paul Young
Suzanne P. Young,
Debtors

Bk. No. 96-11180-JEY

Chapter 13

Confirmation: Nov. 15, 1996
10:00 a.m.

DEBTORS' CHAPTER 13 PLAN DATED MAY 22, 1996

A portion of the debtors' future earnings are submitted to the supervision of the chapter 13 trustee, or paid directly to certain creditors as follows:

1. The debtors will offer their residential real estate located at 21 Hearthside Circle, Bedford, New Hampshire, for sale at an offering price not to exceed $195,000.00. The debtors shall engage a reputable local real estate brokerage firm, whose employment is approved by the bankruptcy court in accordance with Bankruptcy Code Section 327, to assist them in selling this property.. The property is currently on the market and shall remain so. From the proceeds of the sale of this real estate, there shall be paid, insofar as such proceeds are available, the following in the order here specified:

A. The expenses necessary to consummate the sale transaction, including, but not limited to, payment of the real estate broker's

commission, expenses for preparation and recording of the deed and other documents, payment of real estate transfer taxes, prorations of current real estate taxes and other municipal liens, fuel in tanks, utility charges, water and sewer rates and similar items, and any expenses for obtaining bankruptcy court approval of the sale, or that are allowable under Section 506(c) of the Bankruptcy Code.

B. Any and all real estate taxes owing with respect to the property at the time of the sale to the town of Bedford.

C. Amounts owing to Citicorp. Mortgage on account of its first mortgage loan on the property. Any amounts alleged to be due on this mortgage loan in the nature of attorney's fees and expenses, costs of collection, costs for foreclosure and the like shall not be paid until and unless approved by the bankruptcy court.

D. Amounts owing to First NH Bank on account of its second mortgage loan on the property. Any amounts alleged to be due on this mortgage loan in the nature of attorney's fees and expenses, costs of collection, costs for foreclosure and the like shall not be paid until and unless approved by the bankruptcy court.

E. Amounts owing to Bay Bank FSB on account of its third mortgage loan on the property. Any amounts alleged to be due on this mortgage

loan in the nature of attorney's fees and expenses, costs of collection, costs for foreclosure and the like shall not be paid until and unless approved by the bankruptcy court.

F. All remaining amounts up to $60,000.00 shall be remitted to the debtors on account of their homestead exemption.

The liens upon the residence of the debtors which secure the claims described above shall remain in place until the closing of the sale of the residence, at which time they shall be discharged, and the claimants will provide, upon request, properly executed discharges thereof in recordable form.

If the debtors fail to close the sale of their real estate by November 1, 1996, the automatic stay in the Bankruptcy Code at section 562(a) will be lifted automatically on that date without further order of the bankruptcy court, and any creditor holding a lien on the property may thereupon pursue its state law remedies with respect to the property.

2. The debtor shall make payments to the chapter 13 trustee in the amount of $300.00 per month, for sixty (60) months, with the first such payment to be made on June 15, 1996, and the last such payment May 15, 2001. From the payments received by the chapter 13 trustee he or she shall after deduction of the fees allowed to him or her under Bankruptcy Code Section 1302(e),

(a) pay the priority claims, if any, required to be paid by Bankruptcy Code Section 507(a)(1)

(administrative expenses), then

(b) pay other claims entitled to priority, including in particular the claim of the Internal Revenue Service for income taxes and interest (Form 1040) for the debtors' calendar 1992 tax year, then

(c) distribute the amounts remaining from such payments prorata among the allowed claims of general unsecured creditors.

3. Upon confirmation of this plan, all defaults in the debtor's obligations theretofore existing are deemed cured.

4. Upon confirmation of this plan, title to the debtors' property revests in the debtors except as provided above.

Respectfully submitted,

CORNELIUS P. YOUNG and
SUZANNE P. YOUNG
By Their Attorneys
Gray, Wendell & Clark P.C.

May 22, 1996

By /s/_____
Grenville Clark III
BNH01158
650 Elm Street
Manchester, NH 03101
603-625-4100

BGP870289

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

In Re — Bk. No. 96-ll180-JEY

Cornelius Paul Young — Chapter 13
Suzanne P. Young,
Debtors

DEBTORS' REQUEST FOR DISMISSAL

In accordance with Bankruptcy Code sec. 1307(b), this case having not been previously converted, the debtors herein, Cornelius Paul Young and Suzanne P. Young, hereby request that their chapter 13 case be dismissed.

Respectfully submitted,

CORNELIUS PAUL YOUNG and
SUZANNE P. YOUNG
By Their Attorneys
Gray, Wendell & Clark P.C.

October 23, 1996

/s/_____
Cornelius Paul Young

By:/s/_____
Grenville Clark III
BNH 01158
650 Elm Street
Manchester, NH 03101
603-625-4100

/s/_____
Suzanne P. Young

(Certificate of service upon all creditors, including the Internal Revenue Service, is omitted in printing.)

U.S. Bankruptcy Court
District of New Hampshire (Manchester)

Bankruptcy Petition #: 97-10848

Date filed: 3/12/97
Assigned to: Judge Mark W. Vaughn
Chapter 7 voluntary no asset joint

	*Attorneys *
CORNELIUS PAUL YOUNG aka Paul Young 33 Purdue Street Manchester, NH 03103 SSN: 152-34-9123 * Debtor *	Grenville Clark Gray, Wendell & Clark The Center of NH 650 Elm Street Manchester, NH 03101 (603) 625-4100
SUZANNE P. YOUNG dba Young Impressions Art Studio 33 Purdue Street Manchester, NH 03103 SSN: 016-40-7337 *Debtor*	Grenville Clark (See above)
VICTOR W. DAHAR, Trustee 20 Merrimack Street Manchester, NH 03101 SSN: 02-0358076 *Trustee*	

Proceedings include all events. REOPEN

Docket as of October 1, 1998 1:32 pm

3/12/97	1	Voluntary Petition all schedules and statements. Receipt #: 55250 Amount $: 175. (gfo) [EOD 3/13/97] [97-10848]
3/13/97	--	First Meeting of Creditors Scheduled For 10:30 4/11/97 At 6th Floor, Room 642 Last Day To Oppose Discharge: 6/11/97 (gfo) [EOD 03/13/97] [Edit date 03/14/97] [97-10848]
3/13/97	2	Certificate of Appointment of Interim Trustee. (jjc) [EOD 03/14/97] [97-10848]
3/16/97	3	Courts Certificate of Mailing [0-0] First Meeting # of notices: 91. (jjc) [EOD 03/24/97] [97-10848]
4/14/97	4	First Meeting Held and Examination of Debtor. Date Held 4/11/97. (gl) [EOD 04/15/97] [97-10848]
4/14/97	5	Trustee's Report of No Assets. (gl) [EOD 04/15/97] [97-10848]

6/6/97	6	Notice of Appearance And Request For Service Of Notice By John B. Herron for Creditor American Express Travel Related Svcs. Co. (gl) [EOD 06/09/97] [97-10848]
6/6/97	7	Notice of Appearance And Request For Service Of Notice By Wendall Livingston for Creditor Max Recovery Trust I. (gl) [EOD 06/09/97] [97-10848]
6/17/97	8	Order Discharging Debtor Suzanne P. Young, Debtor Cornelius Paul Young (mdkt) [EOD 06/17/97] [97-10848]
9/22/97	--	Case Closed. (gl) [EOD 09/22/97] [97-10848]
9/22/97	9	Order to Close Case and Discharging Trustee. (gl) [EOD 09/22/97] [97-10848]
7/10/98	10	Motion By Debtor Suzanne P. Young, Debtor Cornelius Paul Young To Reopen Case to determine dischargeability of IRS debt. (gl) [EOD 07/10/98] [97-10848]

7/13/98	11	Order Granting [10-1] Motion To Reopen Case to determine dischargeability of IRS debt by Cornelius Paul Young, Suzanne P. Young Case can be reclosed on 9/11/98. (ds) [EOD 07/14/98] [97-10848]
7/21/98	--	CASE REOPENED (km) [EOD 07/21/98] [97-10848]
7/28/98	--	Complaint (98-1096) Cornelius Paul Young vs. United States of America (IRS). NOS 426 Dischargeability 523..(gl) [EOD 07/29/98] [98-1096]

Supreme Court, U.S.
FILED
NOV 9 2001
CLERK

(4)

No. 00-1567

In the Supreme Court of the United States

Cornelius P. Young and Suzanne P. Young,
Petitioners,

v.

United States of America,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITIONERS' BRIEF ON THE MERITS

GRENVILLE CLARK III
Counsel of Record
GRAY, WENDELL & CLARK, P.C.
650 ELM STREET
MANCHESTER, NH 03101
(603) 625-4100

Counsel for Petitioners

BECKER GALLAGHER LEGAL PUBLISHING, INC.
CINCINNATI, OH 800.890.5001

HHPP

QUESTIONS PRESENTED

1. Whether the Youngs' 1992 income tax obligation was discharged by the entry of a discharge in their 1997 chapter 7 bankruptcy case where the three-year period set forth at §507(a)(8)(A)(i) of the Bankruptcy Code had elapsed between the due date of their tax return and the filing of their chapter 7 bankruptcy case.

2. Whether the three-year period set forth at Bankruptcy Code §507(a)(8)(A)(i) was tolled or extended by the length of time that the Youngs were debtors in a prior chapter 13 bankruptcy proceeding, notwithstanding the absence of any language in §507(a)(8)(A)(i) or elsewhere that allows such tolling.

PARTIES TO THE PROCEEDING

Petitioners

Cornelius Paul Young and Suzanne P. Young, individuals with no corporate affiliations.

Respondents

The United States of America

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DECISIONS BELOW

The opinion of the court of appeals is reported at *Young v. United States (In re Young)*, 233 F.3d 56 (1st Cir. 2000). The Order of the United States District Court for the District of New Hampshire is not reported, but is reproduced in App. C of the Petition for Certiorari at 12a-13a (hereinafter App. to Pet. for Cert.). The opinion of the United States Bankruptcy Court for the District of New Hampshire is reported at *Young v. United States (In re Young)*, 1999 Bankr. Lexis 557; 99-1 U.S. Tax Cas. (CCH) ¶50,553; 83 A.F.T.R.2d (RIA) 2876.

JURISDICTION IN THIS COURT

The opinion of the United States Court of Appeals for the First Circuit was issued on December 1, 2000, and was modified by an *Errata* issued December 20, 2000. A petition for a writ of certiorari was filed with this Court on March 1, 2001, within 90 days of the December 1, 2001, opinion, as required by Supreme Court Rule 13. This court has jurisdiction under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The statutes involved are found either in the Bankruptcy Code, 11 U.S.C. 101 *et seq.*, hereinafter sometimes cited as Bankruptcy Code §__, or in the Internal Revenue Code, 26 U.S.C. 101 *et seq.*, hereinafter sometimes cited as IRC §_. The particular provisions of the Bankruptcy Code and the Internal Revenue Code are as follows:

Bankruptcy Code §727

(a) The court shall grant the debtor a discharge,....

(b) Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter,'....

Bankruptcy Code §523

(a) A discharge under section 727, 1141, 1228(a), 1228(b) or 1328(b) of this title does not discharge an individual debtor from any debt —

(1) for a tax or a customs duty —

(A) of the kind and for the periods specified in section 507(a)(2) or 507(a)(8) of this title, whether or not a claim for such tax was filed or allowed;

(B) with respect to which a return, if required —

(i) was not filed; or

(ii) was filed after the date on which such return was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition; or

(C) with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax; . . . .

* * * *

(b) Notwithstanding subsection (a) of this section, a debt that was excepted from discharge under subsection (a)(1), (a)(3), or (a)(8) of this section . . . in a prior case concerning the debtor under this title, or under the Bankruptcy Act, is dischargeable in a case under this title unless, by the terms of subsection (a) of this section, such debt is not dischargeable in the case under this title.

Bankruptcy Code §507(a)

(8) Eighth, allowed unsecured claims of governmental units, only to the extent that such claims are for —

(A) a tax on or measured by income or gross receipts —

(i) for a taxable year ending on or before the date of filing of the petition for which a return, if required, is last due, including extensions, after three years before the date of the filing of the petition; [or]

(ii) assessed within 240 days, plus any time plus 30 days during which an offer in compromise with respect to such tax that was made within 240 days after such assessment was pending, before the date of the filing of the petition;. . . .

Bankruptcy Code §108(c)

Except as provided in section 524 of this title, if applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor . . . and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of—

> (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or
>
> (2) 30 days after notice of the termination or expiration of the stay under section 362, 922, 1201, or 1301 of this title, as the case may be, with respect to such claim.

Bankruptcy Code §105(a)

The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

Internal Revenue Code §6501

(a) General rule.

Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) or, if the tax is payable by stamp, at any time after such tax became due and before the expiration of 3 years after the date on which any part of such tax was paid, and no proceeding in a court without assessment for the collection of such tax shall be begun after the expiration of such period.

Internal Revenue Code §6502

Collection after assessment:

(a) Length of period.

Where the assessment of any tax imposed by this title has been made within the period of limitation properly applicable thereto, such tax may be collected by levy or a by proceeding in court, but only if the levy is made or the proceeding begun—

> (1) within 10 years after the assessment of the tax, or
>
> (2) prior to the expiration of any period for collection agreed upon in writing by the Secretary and the taxpayer before the expiration of such 10-year period . . .

Internal Revenue Code §6503

* * * *

(b) Assets of taxpayer in control or custody of court.

The period of limitations on collection after assessment prescribed in section 6502 shall be suspended for the period the assets of the taxpayer are in the control or custody of the court in any proceeding before any court of the United States or any State or of the District of Columbia, and for 6 months thereafter.

* * * *

(h) Cases under title 11 of the United States Code.

The running of the period of imitations provided in section 6501 or 6502 on the making of assessments or collection shall, in a case under title 11 of the United States Code, be suspended for the period during which the Secretary is prohibited by reason of such case from making the assessment or from collecting and—

(1) for assessment, 60 days thereafter, and
(2) for collection, 6 months thereafter.

STATEMENT OF THE CASE

The petitioners, Mr. and Mrs. Young, filed their 1992 federal income tax return with the Internal Revenue Service (the "IRS") on October 15, 1993, after obtaining extensions from the usual April 15 filing date. App. 5-6. The IRS assessed the tax in accordance with IRC §6501 on January 3,

1994. App. 6. Since the Youngs had not paid their tax obligation, they made monthly installment payments to the IRS between April 1994 and November 1995, initially at $50 per month and later $300 per month. App. 7-8. The Youngs did not sign or file an offer in compromise with respect to this tax obligation. App. to Pet. for Cert. 15a; App. 5-8.

The Youngs then filed a chapter 13 bankruptcy proceeding in the United States Bankruptcy Court for the District of New Hampshire on May 1, 1996. App. 9-10. By doing so, the automatic stay under Bankruptcy Code §362(a) immediately came into effect, thereby preventing creditors — including the IRS — from collecting debts, including tax obligations, from the Youngs. During the chapter 13 proceeding, the Youngs filed a chapter 13 plan which provided, among other things, for the sale of their residence in Bedford, New Hampshire, and in connection with this sale, the payment of closing costs, tax liens and mortgages on the property. App. 12-13, 28-30. It also provided for payment in full of their 1992 priority income tax obligation, as specified in the IRS' amended proof of claim (App. 23), over a five-year period through monthly plan payments of $300 each made through the chapter 13 trustee. App. 30-31. The bankruptcy court below specifically stated that it ". . . imputes no bad faith on the Plaintiffs . . ." in connection with their bankruptcy proceedings. App. to Pet. for Cert. 20a.

After their house was sold, the debtors' employment of special counsel, Attorney Norene Farr, was dealt with by the bankruptcy court. App. 14-15. The Youngs then elected to file a notice of voluntary dismissal of their chapter 13 case in accordance with §1307 of the Bankruptcy Code, and did so on October 23, 1996. App. 15, 32. Between the date of the filing of their chapter 13 petition on May 1, 1996, and the filing of their notice of dismissal on October 23, there elapsed

176 days, or almost six months. Since their chapter 13 plan had never been confirmed, the plan payments they had made to the trustee were returned to the Youngs in accordance with Code §349(b)(3). Thereafter, after an administrative expense request of the chapter 13 trustee was granted, the Youngs' chapter 13 case was closed on March 13, 1997. App. 16-17.

On March 12, 1997, the Youngs filed a chapter 7 bankruptcy petition in the New Hampshire bankruptcy court. App. 35. They were granted a chapter 7 discharge on June 17, 1997, after which, on September 22, 1997, their chapter 7 case was closed. App. 36. It was then reopened on July 13, 1998, at the Youngs' request, to allow them to file a complaint with the bankruptcy court to determine whether their 1992 income tax obligation had been discharged. App. 37.

SUMMARY OF ARGUMENT

The Bankruptcy Code permits the discharge of a taxpayer's income tax obligation for a taxable year for which the tax return is due more than three years before the filing of the debtor's bankruptcy petition. Since the Youngs filed their chapter 7 bankruptcy petition on March 12, 1997, approximately three years and five months after the filing of their 1992 income tax return on October 15, 1993, their 1992 income tax obligation was discharged by reason of the discharge they received in their chapter 7 case. Sections 727(b), 523(a)(1)(A) and 507(a)(8)(A)(i) of the Bankruptcy Code command this result. Because these provisions are unambiguous, their plain language controls and no resort to notions of equitable tolling or to legislative intent is required or even permitted. This result is also mandated by the explicit provision of §523(b) which provides that tax and other claims not dischargeable in an earlier bankruptcy can nevertheless be

discharged in a later one.

This result is also supported by legislative history, which demonstrates that Congress carefully struck a balance between the need for the debtor's fresh start, the need of general creditors to recover from a debtor's bankruptcy estate and protection of the public treasury from wholesale tax avoidance. Congress has developed an intricate statutory scheme in both the Bankruptcy Code and the Internal Revenue Code that specifies under what circumstances the time periods for the assessment and collection of income taxes can be tolled or enlarged, and the absence of such a provision in Bankruptcy Code §507(a)(8)(A)(i) is not simply an oversight on the part of Congress.

Nevertheless, a majority of courts that have considered this matter have judicially grafted into §507(a)(8)(A)(i) an extension or tolling period. The policies that are said to support this grafting are the supposed inability of the tax collector to collect taxes in the face of the automatic bankruptcy stay, the supposition that the three-year period in §507(a)(8)(A)(i) is a period for collection of tax rather than a definition of which taxes are dischargeable, and the potential for abuse and manipulation by taxpayers who file for bankruptcy. These assumptions do not hold water. In reorganization cases, debtors are required to pay their nondischargeable tax obligations in full. The period for collecting taxes is set forth in the Internal Revenue Code, and not in Bankruptcy Code §507(a)(8)(A)(i). Furthermore, the possibility of manipulation and abuse is constrained by multiple provisions of the Bankruptcy Code. Finally, §105(a) of the Bankruptcy Code does not permit bankruptcy courts to gerrymander a tolling or extension provision onto §507(a)(8)(A)(i). Section 105(a) can only be used in a manner consistent with the commands of the Bankruptcy Code and

cannot alter substantive rights.

ARGUMENT

I. UNDER THE PLAIN LANGUAGE OF THE BANKRUPTCY CODE, THE YOUNGS' 1992 INCOME TAX OBLIGATION HAS BEEN DISCHARGED.

As indicated in the Statement of the Case, the Youngs filed their form 1040 federal income tax return for the 1992 calendar year on October 15, 1993, and the IRS assessed the taxes on January 3, 1994. About three years and five months after filing this tax return, the Youngs filed a chapter 7 bankruptcy petition on March 12, 1997. They were granted a chapter 7 discharge pursuant to §727 of the Bankruptcy Code on June 17, 1997.

In accordance with §727(b), this discharge discharged the Youngs from all debts arising before the order for relief "[e]xcept as provided in section 523 of this title . . . ." § 523(a), in turn, provides that a discharge issued under §727 does not discharge individual debtors from any debt

> (1) for a tax or a customs duty —
>
> (A) of the kind and for the periods specified in section 507(a)(2) or 507(a)(8) of this title, whether or not a
>
> claim for such tax was filed or allowed;

Turning to §507(a)(8), (§507(a)(2) does not apply in the Youngs' situation) we find the following language:

> (8) Eighth, allowed unsecured claims of governmental units, only to the extent that such claims are for —
>
> (A) a tax on or measured by income or gross receipts —
>
> (i) for a taxable year ending on or before the date of filing of the petition for which a return, if required, is last due, including extensions, after three years before the date of the filing of the petition; [or]
>
> (ii) assessed within 240 days, plus any time plus 30 days during which an offer in compromise with respect to such tax that was made within 240 days after such assessment was pending, before the date of the filing of the petition;...

Simply put, the Youngs' chapter 7 discharge discharges their 1992 income tax obligation because they filed their chapter 7 petition more than three years after the extended due date for filing their tax return. This is the result commanded by the plain meaning of these statutory provisions. These provisions, although somewhat convoluted, are not ambiguous, and consequently the plain meaning of the language controls. As this Court said in *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235 (1989), "The plain meaning of legislation should be conclusive, except in the rare cases in which the literal application will produce a result

demonstrably at odds with the intentions of its drafters." *Id.* at 242 (Internal quotes, brackets and citations omitted).

The plain meaning of the legislation requires, contrary to the holdings of the courts below, that the Youngs' 1992 income tax obligation be discharged by their 1997 chapter 7 bankruptcy proceeding. If any doubt remains as to the dischargeability of the Youngs' 1992 tax obligation, it is dispelled by §523(b), which addresses dischargeability of certain debts when debtors file serial bankruptcies:

> Notwithstanding subsection (a) of this section, a debt that was excepted from discharge under subsection (a)(1), (a)(3), or (a)(8) of this section, . . . in a prior case concerning the debtor under this title, or under the Bankruptcy Act, is dischargeable in a case under this title unless, by the terms of subsection (a) of this section, such debt is not dischargeable in the case under this title.

The Youngs' sequential filings are fully with the ambit of Code §523(b). Their chapter 13 petition was filed on May 1, 1996, *less* than three years from the filing of their 1992 income tax return on October 15, 1993. By reason of Code §1322(a)(2), their chapter 13 plan had to (and did) provide for the ". . .full payment, in deferred cash payments, of all claims entitled to priority under section 507 of this title. . . ." Code §507 in turn defines which claims are entitled to priority of distribution and the order of priority, and it includes as the eighth priority at §507(a)(8)(A)(i) income taxes for which returns were due within the three-year period preceding the bankruptcy filing — in other words, the Youngs' 1992 income tax obligation.

Yet when the Youngs filed their chapter 7 petition on March 12, 1997, *more* than three years had elapsed since they filed their 1992 tax return on October 15, 1993. In this proceeding, the taxes were dischargeable by the application of §§ 727(a), 523(a)(1)(A) and 507(a)(8)(A)(i). Section 523(b) precisely contemplates this result, and although it deals specifically with successive bankruptcy filings by a debtor, it contains no language about tolling or extending time periods where the lapse of time enters into the definition of what debts are dischargeable. Section 523(b) refers to debts excepted from discharge under (a)(1) (recent tax obligations), (a)(3) (debts not listed in time for a creditor to file a proof of claim or bring a non-dischargeability action), and (a)(8) (educational or student loans that have been in repayment for more than seven years[1]). For these time-related debts, Code §523(b) specifically permits discharge in a subsequent bankruptcy proceeding although not discharged in an earlier one — which is precisely the Youngs' situation.

II. THE RESULT REACHED FROM A PLAIN READING OF THE STATUTES IS CONSISTENT WITH LEGISLATIVE INTENT.

The result at which we arrive from a plain reading of the statutes is consistent with, not contrary to, the intent of Congress, as expressed in legislative history, other sections of the Bankruptcy Code and sections of the Internal Revenue Code that deal with the assessment and collection of income taxes.

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[1] This seven-year provision was repealed on October 7, 1998, leaving "undue hardship" as the only grounds available to discharge student loans.

A. A primary purpose of bankruptcy is to provide debtors with a fresh start.

One main objective of Congress in enacting bankruptcy legislation in general, and the Bankruptcy Code in particular, is to provide individual debtors a "fresh start" unencumbered by the burden of unmanageable debt. As this Court stated long ago, "A primary purpose of the bankruptcy act is to relieve the honest debtor of the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes." *Westmore v. Markoe*, 196 U.S. 68, 77 (1904). As the provisions of Bankruptcy Code §523 make clear, however, the debtor's "fresh start" is not always entirely free of prior obligations, since Congress has provided, for reasons of public policy, that certain debts remain undischarged. The most common among these that affect individual debtors are obligations for alimony and child support (§523(a)(5)), student loan obligations (§523(a)(8)) and, of course, recently incurred tax obligations, whether federal, state or local (§§523(a)(1) and 507(a)(8)).

B. Congress also intended to relieve bankruptcy debtors of their obligation to pay stale tax claims.

The intention of the drafters of the three-year measure for determining which income taxes are discharged was, as the court of appeals below correctly stated, to "prevent large accumulations of tax claims" that "remain unpaid for long periods of time." (App. to Pet. for Cert. 4a-5a). To remedy this, Congress enacted, in 1966, section 35(a) of the Bankruptcy Act, which provided that, "A discharge in bankruptcy shall release a bankrupt from all of his provable debts . . . except . . . taxes which became legally due and

owing by the bankrupt within three years preceding bankruptcy . . . "

The legislative history also expresses a concern for general creditors. The court in *United States v. Norton,* 717 F.2d 767 (3rd Cir. 1983) summarized the legislative history in the following manner:

> The legislative history of the Bankruptcy Reform Act is replete with references to the effect the proposed legislation would have on the collection of taxes. *See, e.g.*, S Rep. No. 1106, 95th Cong., 2d Sess. (1978) (Committee on Finance); S. Rep. No. 989, 95th Cong. 2d Sess. (Judiciary Committee) *reprinted* in 1978 U.S. Code Cong. & Ad. News 5787. These references make clear that the Bankruptcy Code attempts to reconcile three sets of interests that usually co-exist in tension: the interests of general creditors who do not want a debtor's funds to be exhausted by accumulated back taxes; the interests of debtors whose "fresh start" should not be burdened by accumulated taxes; and the interests of the public in not losing taxes whose collection the law has restrained.

In balancing these interests, the Congress gave the IRS a priority claim on the assets of a debtor's estate for tax liabilities that had not grown so "stale" as to burden general unsecured creditors who may have extended credit after the liabilities arose. To avoid hampering the debtor's fresh start, Congress coordinated the priority and discharge

provisions of the Code so that unpaid taxes accorded priority are nondischargeable, while tax claims that are not given priority are usually not collectible from the debtor's post-bankruptcy assets. S. Rep. No. 1106, *supra* at 5; S. Rep. No. 989, *supra* at 14-15.

Id. 770.

Notably absent from this legislative history is any mention that the three-year measuring period was intended to serve as a period for *collection* of a tax obligation.

III. OTHER PROVISIONS OF THE BANKRUPTCY CODE AND INTERNAL REVENUE CODE MAKE EXPLICIT PROVISION FOR EXTENDING IRS TAX ASSESSMENT AND COLLECTION DEADLINES WHILE §507(a)(8)(A)(i) DOES NOT.

Other provisions of the Bankruptcy Code demonstrate that Congress did not intend the three-year measuring period in §507(a)(8)(A)(i) to be tolled or extended for any reason other than the one expressly set forth in the statute — the duration of any filing extension granted by the IRS from the normal April 15 filing deadline.

Congress enacted an explicit extension provision in the very next subparagraph that follows §507(a)(8)(A)(i). Section 507(a)(8)(A)(ii) provides that an income tax obligation is not discharged if it was assessed less than 240 days prior to the filing of a debtor's bankruptcy petition. It also provides, however, that if the debtor had filed an offer in compromise with respect to his tax obligation during the 240-day period, the period is enlarged by the length of time that the offer in compromise is pending, plus an additional 30 days.

When a taxpayer files an offer in compromise, the IRS normally suspends collection activities with respect to the tax obligations that are the subject of the offer.[2] The explicit enlargement or tolling provision in Bankruptcy Code §507(a)(8)(A)(ii) permits the IRS to consider the taxpayer's offer in compromise without fear that its time to collect the tax will expire should the offer be rejected.

The presence of an explicit extension or tolling provision in §507(a)(8)(A)(ii) contrasts sharply with the absence of one in the subparagraph immediately preceding it. We submit that the omission of an extension provision in §507(a)(8)(A)(i) is not an oversight by Congress. Instead, Congress saw §507(a)(8)(A)(i) as serving a different function from that of setting periods in which the IRS could assess and collect taxes. That function was to *define* which taxes are dischargeable and which are not, not to set a time period for the *collection* of a tax.

Congress also explicitly dealt with tolling periods in the Bankruptcy Code at §108. This section, which is entitled "Extension of time" and which is applicable throughout the Code (§103(a)), provides for the tolling of statutes of limitation and the like when bankruptcy intervenes. As to claims pending *against* a debtor, §108(c)(2) provides, for example, that a statute of limitation that would expire under "applicable nonbankruptcy law" during the pendency of a bankruptcy case is extended and expires 30 days after termination or expiration of the automatic bankruptcy stay

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[2] IRC §6331(k)(1) and (2), enacted as part of the IRS Restructuring and Reform Act of 1998, codified prior IRS practice of suspending collection activity when an offer in compromise was filed in good faith.

arising under §362(a).[3]

Additionally, Code §108(c)(1) explicitly extends limitation periods by the amount of time "applicable non-bankruptcy law" itself suspends the running of a statute of limitation on account of a bankruptcy proceeding. This provision is tailor-made to fit with provisions of the IRC concerning the time for collecting taxes, and indeed the legislative history explicitly so states. The particular sections of the Internal Revenue Code involved are §6502 and 6503. Section 6502(a)(1) allows the IRS ten years (not three) in which to collect a tax once assessed. Section 6503 then sets forth nine paragraphs describing circumstances that further enlarge the ten-year collection period. Among these are subparagraphs (b) and (h):

> (b) The period of limitations on collection after assessment prescribed in section 6502 shall be suspended for the period the assets of the taxpayer are in the control or custody of the

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[3] Expiration and termination of the automatic bankruptcy stay is governed by §362(c) and (d) of the Code. The stay expires under §362(c)(2) upon the earliest of the closing of the case, dismissal of the case or the granting of a discharge. Additionally, while a case is pending, §362(d) allows a party in interest to request that the stay be terminated.

Of course, if the stay expires because a discharge has been granted, the creditor's claims against the debtor may have been discharged (see Code §524(a)) and extension of the statute of limitation would become moot. However, for a nondischargeable claim, such as a debt incurred through fraud (Code §523(a)(2)), the tolling provisions of Code §108(c) would enlarge the non-bankruptcy statute of limitation period in which suit could be brought.

> court in any proceeding before any court of the United States or any State or of the District of Columbia, and for 6 months thereafter.
>
> and
>
> (h) The running of the period of limitations provided in section 6501 or 6502 on the making of assessments or collection shall, in a case under title 11 of the United States Code, be suspended for the period during which the Secretary is prohibited by reason of such case from making the assessment or from collecting and—
>
> (1) for assessment, 60 days thereafter, and
>
> (2) for collection, 6 months thereafter.

Bankruptcy Code §108(c)(1) and IRC §§6502 and 6503(b) and (h) dovetail to enlarge the ten-year collection period (and the three-year assessment period under IRS §6501) by the ". . . period during which the Secretary is. . . prohibited by reason of [the debtor's bankruptcy] case from making the assessment or from collecting . . ."

This is precisely the result intended by Congress:

> In the case of Federal tax liabilities, the Internal Revenue Code suspends the statute of limitations on a tax liability of a taxpayer from running while his assets are in the control or custody of a court and for 6 months thereafter. . . . The amendment applies this rule in a title 11 proceeding. Accordingly, the statute of

> limitations on collection of a *nondischargeable* Federal tax liability of a debtor will resume running after 6 months following the end of the period during which the debtor's assets are in the control or the custody of the bankruptcy court. This rule will provide the Internal Revenue Service with adequate time to collect *nondischargeable* taxes following the end of the title 11 proceedings. (emphasis added)
>
> S.Rep. No. 989, 95th Cong., 2nd Sess. 30-31 (1978), U.S. Code Cong. & Admin. News 1978, pp. 5787, 5816, 5817.

The reference in the Senate Report quoted above to "nondischargeable" taxes is telling. It demonstrates that Congress designed these tolling provisions to allow the IRS additional time to collect nondischargeable taxes when the taxpayer's bankruptcy proceedings intervene. They do not, however, define which taxes are dischargeable in the first place. Congress has properly left the task of defining which taxes are dischargeable to the Bankruptcy Code, and the three-year aging rule originally enacted in 1966 and now found at Code §507(a)(8)(A)(i) is part of the definition. It belies the assertion made by many courts, including the bankruptcy court below, that "It is clear that Congress intended the IRS to be granted three years to collect taxes. . . ." App. to Pet. for Cert. 21a.

IV. THE ASSUMPTIONS THAT UNDERLIE THE HOLDINGS OF THE COURTS THAT ADHERE TO THE MAJORITY VIEW ARE FAULTY.

Despite the statutory structure portrayed above — and the legislative history that supports it — the majority of courts

that have considered the issue have engrafted a tolling or extension period onto the three-year period set out at Code §507(a)(8)(A)(i). These courts have done so using several assumptions and premises, none of which hold up upon closer examination.

A. The IRS is not barred by the automatic bankruptcy stay from collecting money from debtors who are in reorganization cases.

The first of these faulty assumptions is that the IRS is completely barred by the automatic stay from collecting any money from a debtor during his earlier bankruptcy proceeding. For example, the court of appeals in *Richards v. United States (In re Richards)*, 994 F.2d 763 (10th Cir. 1993) asserts that the government was prevented from collecting taxes because of the automatic stay in Mr. Richard's first chapter 13 proceeding. *Richards*, at 765. Likewise, in *In re Taylor*, 81 F.3d 20 (3rd Cir. 1996), the court asserted that the IRS was "completely barred from collecting. . ." taxes during the Taylors' earlier chapter 13 proceeding, *Id.* at 23. Similarly, the court in *Waugh v. IRS (In re Waugh)*, 109 F.3d 489 (8th Cir. 1997), *cert. denied*, 522 U.S. 823 (1997), asserted at page 494, that ". . . in Waugh's case, the automatic stay prevented the IRS from collecting Waugh's 1987 taxes from July 1, 1988 until February 6, 1991." Finally, in *Brickley v. United States (In re Brickley)*, 70 B.R. 113 (9th Cir. B.A.P. 1986) the court stated at page 115, "The Debtor's argument that the IRS failed to collect its taxes within the three-year period of non-dischargeability ignores the fact that their property was unreachable during most of that time."

The assumption that the IRS can collect nothing from a debtor during the debtor's earlier bankruptcy proceeding is

incorrect. In almost every case, the prior proceeding is a reorganization under chapter 13 or chapter 11 of the Bankruptcy Code. In contrast to an individual's chapter 7 proceedings,[4] reorganization cases can last years.

Yet during these years, the IRS is, or should be, collecting taxes from the debtor notwithstanding the fact that the automatic stay remains in force. In chapter 13, a debtor is required to file a plan. Code §1321. The plan must provide for "full payment, in deferred cash payments, of priority claims under section 507," including, of course, priority tax claims. Code §1322(a)(2). The plan must be filed within 15 days of the filing of the chapter 13 petition, unless this deadline is extended by the court. Bankruptcy Rule 3015(b). The debtor is required to commence making payments as proposed in his plan within 30 days after the plan is filed, §1326(a)(1), and the chapter 13 trustee is required to make distributions to creditors once the plan is confirmed. Code §1326(a)(2).

Similarly, a debtor in a chapter 11 proceeding has the exclusive right to file a plan for the first 120 days after an

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[4] An individual chapter 7 case can in theory last as little as 81 days from the filing of the chapter 7 petition — which establishes the automatic stay under Code §362(a) — to granting of the debtor's discharge, which dissolves the stay, Code §362(c)(2)(C). Bankruptcy Rule 2003(a) requires that a meeting of creditors be held twenty to forty days after the petition is filed, and Bankruptcy Rule 4004(a) and (c) requires the court to grant a discharge after sixty days has elapsed from the first date set for the meting of creditors. The government implied in its brief in the court of appeals below that the short period that the automatic stay remains in effect in a chapter 7 case is not a significant hindrance to its collection efforts. Brief for the Appellee, at 11 and 14-15.

order for relief is entered. Code §1121(b). A hearing is held on confirmation of the plan, Code §1128(a), and the plan is thereupon confirmed if it meets the requirements of Code §1129. Income tax claims as defined in §507(a)(8) must be paid in full, with interest, in deferred cash payments made over a period not exceeding six years from the date of assessment of the tax. §1129(a)(9)(C). Under Code §1141(d)(2), the chapter 11 discharge does not discharge an individual debtor from debts excepted from discharge under Code §523, which of course includes recently-incurred income tax liabilities.

These provisions, then, require debtors in reorganization proceedings to file and confirm plans that pay their priority tax obligations in full within a maximum of five (chapter 13) or six years (chapter 11). Against this background, the claims of the IRS for court intervention because of the bar of the automatic stay fall flat. The *Brickley* case provides a good illustration of this.

In *Brickley*, the debtors filed their chapter 13 petition in November 1981. The court's opinion does not state whether the debtors' plan was confirmed, but it does say that the Brickleys ". . . were unable to make all the payments required under their Chapter 13 plan." *Id.* at 114. Because of this, the debtors filed a motion to terminate their chapter 13 on August 9, 1984, about two years and nine months after the filing of their chapter 13 petition. They then filed a chapter 7 petition on October 3, 1984, and subsequently received a chapter 7 discharge. They argued that their 1979 and 1980 income tax obligations were discharged in the chapter 7 proceeding.

The court's opinion in *Brickley* does not state whether the debtors' chapter 13 plan was confirmed. If it was, it

presumably provided for the payment in full of the debtors' 1979 and 1980 income tax obligations to the IRS in accordance with §1322(a)(2) of the Bankruptcy Code. If the debtors' plan had not provided for payment in full of the tax obligations, the IRS could have objected to confirmation. Assuming the plan did provide for full payment, the IRS should not have been allowed to complain about being prohibited from collecting taxes from the bankruptcy debtors, since the IRS was, under the debtors' plan, collecting taxes from the bankruptcy debtors.

If, on the other hand, the IRS was not collecting taxes from the Brickleys because the plan for some reason had not been confirmed during the two years and nine months they were in chapter 13, or because the Brickleys were not making payments under a confirmed plan, the IRS could have moved to dismiss or convert the case under §1307(c) of the Bankruptcy Code for any of the numerous reasons set forth there, including unreasonable delay by the debtor that is prejudicial to creditors (§1307(c)(1)), failure to commence making timely plan payments (§1307(c)(4)), or material default by the debtor with respect to a confirmed plan (§1307(c)(6)). In sum, the IRS should not be allowed to collect tax payments from chapter 13 debtors and then argue that they did not have a fair opportunity to collect taxes from them. Nor should the courts enact a tolling period where none exists simply to bail out the IRS for sitting on its hands and doing nothing while a chapter 13 case is pending.

The vacuity of the IRS' argument for automatic tolling of the three-year period of §507(a)(8)(A)(i) for the duration of the debtor's prior bankruptcy is illustrated in *In re Gore,* 182 B.R. 293 (Bankr. N.D. Ala. 1995). In that case, the debtors filed a chapter 13 proceeding without listing the IRS as a creditor, even though they owed taxes to the IRS. The

debtors' plan made no provision for paying the IRS, and because of its lack of notice of the proceeding, the Service would not have willfully violated the automatic stay had it attempted to collect the debtors' tax obligation during the chapter 13 proceeding. The IRS, however, did not.

The chapter 13 proceeding was dismissed 169 days after it began. The debtors subsequently filed a chapter 7 case more than 3 years after the due date of their tax return and claimed, as a result, that their tax obligation had been discharged. The IRS claimed otherwise, arguing that the prior chapter 13 proceeding had tolled or extended the three-year period by the 169-day duration of the chapter 13 proceeding. The court, noting that the IRS had not even assessed, much less attempted to collect, the taxes at issue until after the chapter 13 proceeding had been dismissed, held that the taxes were discharged.

B. The three-year period in Bankruptcy Code §507(a)(8)(A)(i) is not a collection period, but defines which taxes are dischargeable.

Other excuses given by courts as reason to adhere to the majority view are that the IRS is entitled to a full three years to collect priority taxes unencumbered by the automatic stay, and that adding a tolling provision to the three-year period in §507(a)(8)(A)(i) prevents potential taxpayer abuse and tax evasion.

As we have argued earlier at §§ II B. and III of this brief, the three-year period was never intended to set out a period for collecting taxes. Instead Congress intended it to be a part of the definition of which tax obligations are so stale that they should be discharged, and which are not. The only

true tax collection period in the Bankruptcy Code is the 240-day period from assessment set forth at 507(a)(8)(A)(ii). *United States v. Aberl (In re Aberl)*, 78 F.3d 241 (6th Cir. 1996); *Gore v. United States* at 310.

C. The Bankruptcy Code already contains ample restraints on taxpayer manipulation and abuse.

Finally, courts adhering to the majority view point to the potential for abuse and tax evasion by debtor-taxpayers. These claims are exaggerated. A debtor entering into a reorganization proceeding must, as we have seen, submit and confirm a plan that pays his nondischargeable taxes in full. The maximum period for completing payments is five years in chapter 13, and six years from the date of assessment in chapter 11. These are shorter than the ten-year period of IRC §6502 that the IRS has to collect taxes, and nothing guarantees the IRS will collect all it is owed during the ten years. For example, some delinquent taxpayers enter into installment agreements to pay overdue taxes. Such agreements are authorized by IRC §6159. Under this procedure, the taxpayer fills out a collection information statement, form 433-A (or possibly the shorter version, form 433-F). On this form, the taxpayer sets forth his assets and the encumbrances thereon, and, importantly, his monthly income and necessary living expenses. Allowance of important categories of expense, such as housing and transportation, may be limited by the IRS' so-called National Standards and Local Standards. These the IRS has compiled from census and other data to determine reasonable cost of living amounts for the geographical area in which the taxpayer resides. Payments on credit card balances and personal loans are not considered reasonable if allowing payment of them would prevent the taxpayer from paying his tax liability in full

in three years. Internal Revenue Manual 5323.434.

Once a taxpayer has completed the 433-A (or 433-F) form, and downward adjustments are made for non-allowable expenses, there should be left a surplus of income over expenses of, say, $200 per month. This amount then becomes the amount of the monthly installment payment which is entered onto the installment agreement, form 433-D, and then signed. The taxpayer may also be required to sign an agreement extending the 10-year collection period under IRC §6502. The taxpayer then begins making payments to the IRS.[5]

Notably, the amount of the taxpayer's monthly installment was determined by his current income and reasonable living expenses, and not by the size of his unpaid tax obligation. Two hundred dollars a month may pay his obligation in full in three years, or it may not. If the obligation is large, $200 per month may barely keep pace with interest and penalties that continue to accrue. The payments may or may not amortize the full obligation over the 10-year collection period of IRS §6502, or even during a longer period enlarged by an agreed-upon extension of the 10-year period. The point, of course, is that even a fully-implemented installment agreement does not guarantee that past-due taxes will be paid in full before the 10-year collection period expires, whereas a successfully-completed bankruptcy plan does in five or six years.

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[5] Our hypothetical describes in simplified terms the process of entering into an installment agreement with the IRS. For a more thorough description, see R. Schriebman, *IRS Tax Collection Procedures*, chapter 4 (2001).

Also, contrary to the fears expressed in the majority holdings, debtors find it difficult to dive into bankruptcy court and tread water there for three years without filing and confirming a plan of reorganization that provides for payment in full of the debtor's nondischargeable tax obligation. In addition to the weapons of Code §§1112(b) and 1307(c), the IRS can object to confirmation of a debtor's plan (Code §§1128(b) and 1324). The filing of a bankruptcy petition must be in good faith. *Carolin Corp. v. Miller*, 886 F.2d 693 (4th Cir. 1989); *In re Love*, 957 F.2d 1350 (7th Cir. 1992). To be confirmed, plans must be proposed in good faith. Code §§1129(a)(3) and 1325(a)(3). Failure to confirm is grounds for dismissal. Dismissal dissolves the automatic stay, permitting collection once again by the IRS. Collection can include the filing of notices of tax liens on all of the debtor's real and personal property. The bankruptcy court can also, on dismissal, bar the discharge of a debt in a subsequent filing "for cause" under Code §349(a). Finally, §105(a) explicitly authorizes a bankruptcy court enter appropriate orders to prevent an "abuse of process."

V. BANKRUPTCY CODE §105(a) DOES NOT PERMIT THE BANKRUPTCY COURT TO CONTRADICT EXPLICIT PROVISIONS OF THE BANKRUPTCY CODE.

None of the courts below, whether the bankruptcy court, district court or court of appeals, rested its holding upon Bankruptcy Code §105(a), so this not before this Court in this case. Furthermore, the bankruptcy court below explicitly found that ". . . the Court imputes no bad faith on the Plaintiffs. . . ." However, as some courts of the majority persuasion have rested their holdings at least in part on the provisions of §105(a), some discussion of the scope of this section is in order. Section 105(a) provides that:

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

This Court has not become deeply involved with the application of §105(a) in recent years. Even where §105(a) played a prominent role in a case before the Court, *Celotex Corp. v. Edwards*, 514 U.S. 300 (1995), this Court found that it did not have to review the propriety of the bankruptcy court's broad injunction issued under §105(a): ". . . we need not, and do not, address whether the Bankruptcy Court acted properly in issuing the Section 105 Injunction." *Id.* 312.

In *Johnson v. Home State Bank*, 501 U.S. 78 (1991), the Court's opinion noted that ". . . the bankruptcy court retains its broad equitable power to 'issue any order, process or judgment that is necessary or appropriate to carry out provisions of [the Code]' §105(a)," *id.* 89, but the holding in *Johnson* does not rest on this section. In *United States v. Energy Resources Co.*, 495 U.S. 545 (1990), this Court pointed out that bankruptcy courts are indeed courts of equity, *id.* 549, but upheld the order of the bankruptcy court below primarily on the basis of §1123(b)(6), which specifically allows reorganization plans to "include any other appropriate provision not inconsistent with the applicable provisions of this title." Section 105(a) is mentioned simply as an additional basis for affirming the holdings below.

The most significant recent decision of this Court that deals with equity powers granted to bankruptcy courts under the Bankruptcy Code is *United States v. Noland*, 517 U.S. 535 (1996). Here, this Court dealt with the doctrine of equitable subordination under §510(c) of the Code. The bankruptcy court below had subordinated certain IRS tax penalties to classes of claims having a lower priority of distribution under §507. This Court held that even the flexible doctrine of equitable subordination under §510(c) did not permit the bankruptcy court to reorder the priorities mandated by Congress under §507 in a categorical fashion: "The equity chancellor never did, and does not now, exercise unrestricted power to contradict statutory or common law when he feels a fairer result may be obtained by application of a different rule." *Id.* 542, quoting from *In re Ahlswede*, 516 F.2d 784 (9th Cir.).

Although this Court has not recently had reason to consider §105(a) in depth (the *Noland* opinion does not mention §105(a)), the holding in *Noland* is consistent with the views of a number of courts of appeals which have dealt explicitly with §105. They have repeatedly held that although §105(a) confers broad equitable powers on bankruptcy courts, such powers must be used only to "carry out" the provisions of the Code without fashioning or altering substantive rights of debtors or creditors.

> Section 105(a) empowers the bankruptcy court to exercise its equitable powers — where "necessary" or "appropriate" — to facilitate the implementation of other Bankruptcy Code provisions...Although expansively phrased, Section 105 (a) affords bankruptcy courts considerably less discretion than first meets the eye, and in no sense constitutes "'a roving

commission to do equity.'" *Chiasson v. J. Louis Matherne & Associates (In re Oxford Management, Inc.)*, 4 F.3d 1329, 1334 (5th Cir. 1993) (citation omitted). See *In re Lapiania*, 909 F.2d 221, 224 (7th Cir. 1990); *Donovan v. Bundy (In re Donovan)*, 183 B.R. 700, 702 (Bankr. W.D. Pa. 1995) (same). Instead, the equitable discretion conferred upon the bankruptcy court §105(a) "is limited and cannot be used in a manner inconsistent with the commands of the Bankruptcy Code." *In re Plaza de Diego Shopping Center, Inc.*, 911 F.2d 820, 824 (1st Cir. 1990). These limitations have been variously described.

First, Bankruptcy Code §105(a) may not be invoked to alter substantive debtor rights defined under the applicable nonbankruptcy law. See, e.g., *Bird v. Carl's Grocery Company (In re NWFX, Inc.)*, 864 F.2d 593, 596 (8th Cir. 1988) ("An 'equitable setoff' such as that fashioned by the bankruptcy court in the present case is not a proper use of the bankruptcy court's equitable powers because it creates new substantive rights for the parties. . . ."); see also *In re Continental Airlines Corp.*, 907 F.2d 1500, 1509 (5th Cir. 1990) (holding that §105(a) does not permit substantive modifications of labor agreement).

Noonan v. Secretary of Health & Human Services (In re Ludlow Hospital Society., Inc.), 124 F.3d 22, 27 (1st Cir. 1997)

Similarly, the court in *In re Barberi*, 199 F.3d 616 (2nd Cir. 1999) stated: "In addition, the District Court's reliance on 11 U.S.C. §105(a) is misplaced. The equitable powers emanating from §105(a) . . . are not a license for a court to disregard the clear language and meaning of the bankruptcy statutes and rules." *Id.* 620-21 (internal quotes and citations omitted). Likewise, the court in *Kestell v. Kestell*, 99 F.3d 146 (4th Cir. 1996), while holding that §105 is the "basis for a broad exercise of power in the administration of a bankruptcy case," *id.* 148, went on to add that "Section 105 is not, or course, unlimited. It cannot be invoked, for example, to achieve ends contrary to other specific Code provisions." *Id.*

Since Congress has set forth detailed provisions in the Bankruptcy Code to determine which taxes are dischargeable and which are not, bankruptcy courts have no power under §105(a) to hold that a tax dischargeable under a clear provision of the Bankruptcy Code is nevertheless not discharged.

CONCLUSION

For the reasons set forth above, this Court should reverse the holding of the United States Court of Appeals for the First Circuit and hold that the Youngs' 1992 income tax obligation was discharged by their chapter 7 bankruptcy.

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In the Supreme Court of the United States

CORNELIUS P. YOUNG AND SUZANNE P. YOUNG,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

Whether the three-year time limit for establishing the priority and nondischargeability of income taxes under the Bankruptcy Code, 11 U.S.C. 507(a)(8)(A)(i), 523(a)(1)(A), is tolled during the time an automatic stay in the debtors' prior bankruptcy proceeding precluded the government from collecting those taxes.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 233 F.3d 56. The opinion of the district court (Pet. App. 12a-13a) is unofficially reported at 2000-2 U.S. Tax Cas. (CCH) ¶ 50,522. The opinion of the bankruptcy court (Pet. App. 14a-22a) is unofficially reported at 99-1 U.S. Tax Cas. (CCH) ¶ 50,553.

JURISDICTION

The court of appeals entered its judgment on December 1, 2000. The petition for a writ of certiorari was filed on March 1, 2001, and was granted on September 25, 2001. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. 11 U.S.C. 105(a) provides, in relevant part:

The court may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title. * * *

2. 11 U.S.C. 108(c) provides:

Except as provided in section 524 of this title, if applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor, * * * and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of—

(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or

(2) 30 days after notice of the termination or expiration of the stay under section 362, 922, 1201, or 1301 of this title, as the case may be, with respect to such claim.

3. 11 U.S.C. 362(a) provides, in relevant part:

Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title * * * operates as a stay, applicable to all entities, of—

* * * * *

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title.

* * * * *

4. 11 U.S.C. 507(a) provides, in relevant part:

The following expenses and claims have priority in the following order:

* * * * *

(8) Eighth, allowed unsecured claims of governmental units, only to the extent that such claims are for—

(A) a tax on or measured by income or gross receipts—

(i) for a taxable year ending on or before the date of the filing of the petition for which a return, if required, is last due, including extensions, after three years before the date of the filing of the petition;

(ii) assessed within 240 days, plus any time plus 30 days during which an offer in compromise with respect to such tax that was made within 240 days after such assessment was pending, before the date of the filing of the petition; or

(iii) other than a tax of a kind specified in section 523(a)(1)(B) or 523(a)(1)(C) of this title, not assessed before, but assessable, under applicable law or by agreement, after, the commencement of the case.

* * * * *

5. 11 U.S.C. 523(a) provides, in relevant part:

(a) A discharge under section 727 * * * of this title does not discharge an individual debtor from any debt—

(1) for a tax or a customs duty—

(A) of the kind and for the periods specified in section 507(a)(2) or 507(a)(8) of this title, whether or not a claim for such tax was filed or allowed.

* * * * *

6. 11 U.S.C. 727(b) provides, in relevant part:

Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter * * *.

7. 26 U.S.C. 6503 (1994 & Supp. V 1999) provides in relevant part:

(b) **Assets of taxpayer in control or custody of court**

The period of limitations on collection [of taxes] after assessment prescribed in section 6502 shall be suspended for the period the assets of the taxpayer are in the control or custody of the court in any proceeding before any court of the United States or of any State or of the District of Columbia, and for 6 months thereafter.

* * * * *

(h) **Cases under title 11 of the United States Code**

The running of the period of limitations provided in section 6501 or 6502 on the making of assessments or collection [of taxes] shall, in a case under title 11 of the United States Code, be suspended for the period during which the Secretary is prohibited by reason of such case from making the assessment or from collecting and—

(1) for assessment, 60 days thereafter, and

(2) for collection, 6 months thereafter.

* * * * *

STATEMENT

1. Under the Bankruptcy Code, income tax claims held by federal, state, and local governments enjoy priority for payment in bankruptcy proceedings if the tax returns from which those claims arise were due within three years of the filing of the bankruptcy petition. 11 U.S.C. 507(a)(8). Those same taxes are also protected from discharge. 11 U.S.C. 523(a)(1)(A). That means that, if the tax claim is not satisfied during the bankruptcy proceeding, the claim passes through the case and the government may seek to collect the taxes from the debtor after the automatic stay in the bankruptcy proceeding has been terminated. That three-year time limit is popularly known as the "three-year lookback period."

The Bankruptcy Code offers individual debtors two primary avenues of debt relief. First, individual debtors may seek a discharge of their debts under Chapter 7 of the Bankruptcy Code, 11 U.S.C. 701 *et seq.* Under that Chapter, a debtor liquidates his non-exempt

assets, which are then distributed to creditors pursuant to a schedule of priorities. See 4 *Collier on Bankruptcy* ¶ 700.01 (Lawrence P. King ed., 15th ed. 2001). Income taxes arising from returns due within the three years preceding the petition enjoy an eighth priority for distribution in such proceedings and are not subject to discharge. 11 U.S.C. 507(a)(8), 523(a)(1)(A). Because a debtor immediately relinquishes his assets to a trustee for distribution to his creditors, a Chapter 7 proceeding generally proceeds expeditiously to discharge, unless a creditor objects. See Fed. R. Bankr. P. 2003(a), 4004.

In the alternative, a debtor may attempt to repay his debts by filing for reorganization under Chapter 13 of the Bankruptcy Code, 11 U.S.C. 1301 *et seq.* Chapter 13 "provides a reorganization remedy for consumer debtors and proprietors with relatively small debts." *Johnson* v. *Home State Bank*, 501 U.S. 78, 82 (1991). Individuals proceeding under Chapter 13 must adopt a repayment plan for their debts. That plan must, among other things, ensure the full payment of priority tax claims, which includes income taxes arising from returns due within the three years preceding the filing of the Chapter 13 petition, 11 U.S.C. 507(a)(8). See 11 U.S.C. 1322(a)(2). Debtors are obligated to begin making monthly payments to a Chapter 13 trustee soon after the bankruptcy petition is filed, but none of that money is actually distributed to creditors until the plan is finally confirmed. 11 U.S.C. 1326. After completion of the repayment plan, a debtor obtains a discharge of any remaining unpaid debts provided for by the plan. 11 U.S.C. 1328(a).[1]

---

[1] While individuals, as well as businesses, can pursue reorganization under Chapter 11, *Toibb* v. *Radloff*, 501 U.S. 157, 160-166 (1991), most individuals prefer Chapter 13's simplified procedures.

Whether the debtor proceeds under Chapter 7 or 13, the filing of a bankruptcy petition triggers an "automatic stay" under 11 U.S.C. 362(a). The automatic stay prevents, among other things, the government from administratively or judicially collecting a debtor's prepetition tax liabilities or filing a notice of federal tax lien. 11 U.S.C. 362(a)(4) and (6). The automatic stay continues in effect until the property sought by the creditor is no longer property of the estate, the case is closed or dismissed, or the debtor is granted a discharge. 11 U.S.C. 362(c). As a general rule, the automatic stay remains in effect much longer in a Chapter 13 bankruptcy case than it does in a Chapter 7 proceeding. That is because a debtor proceeding under Chapter 7 usually receives a discharge shortly after relinquishing control of his prepetition assets to the trustee. The stay in a Chapter 13 case remains in effect until the repayment plan is completed (and the debtor is thereby discharged), which generally occurs three to five years after the petition is filed. 11 U.S.C. 1322(d), 1328(a).

Because the automatic stay interrupts the ability of all creditors, including the federal government, to pursue actions against the debtor, Section 108 of the Bankruptcy Code, 11 U.S.C. 108, tolls those nonbankruptcy limitations periods until the later of either (1) the end of the nonbankruptcy limitations period, including any suspensions of the period provided by nonbankruptcy law, or (2) thirty days after the bankruptcy stay is ended. 11 U.S.C. 108(c). The Internal Revenue Code likewise suspends the running of its own three-year limitation period on tax assessments (26 U.S.C. 6501(a) (1994 & Supp. V 1999)) and ten-year time limit on collections (26 U.S.C. 6502(a)(1) (Supp. V 1999)) for the time "during which the Secretary is

prohibited by reason of such case from making the assessment or from collecting." 26 U.S.C. 6503(h).

2. a. Petitioners received from the IRS an extension of time in which to file their 1992 federal income tax return until October 15, 1993, and they filed their return within that extended period. Despite earning more than $160,000 in 1992, however, petitioners paid only about $13,000 of their acknowledged $28,578 tax liability. Pet. App. 15a-16a; J.A. 5-6. The United States was able to collect only a portion of the remaining past-due taxes before May 1, 1996. On that date, petitioners filed a Chapter 13 bankruptcy petition. Pet. App 2a. That filing triggered the Bankruptcy Code's automatic stay, which barred the government from taking any further measures to collect the remaining unpaid taxes. 11 U.S.C. 362(a)(6).

Because petitioners' Chapter 13 bankruptcy case was filed less than three years after October 15, 1993—when their tax return for the 1992 tax year was due—petitioners were required to submit a Chapter 13 plan that provided for full payment of the government's claim. Pet. App. 15a. Although petitioners submitted such a plan, they failed to seek or obtain confirmation of that plan. *Id.* at 16a. Instead, on October 23, 1996—eight days after the three-year lookback period of Section 507(a)(8) expired—petitioners filed a notice of dismissal of their Chapter 13 bankruptcy case. See *id.* at 2a.[2] In February 1997, the trustee filed his final report, which was approved by the bankruptcy court, and the Chapter 13 case was closed on March 13, 1997. Pet. App. 16a. When, as here, dismissal occurs before a

[2] Chapter 13 allows debtors to request that the bankruptcy court dismiss their cases voluntarily at any time. 11 U.S.C. 1307(b).

Chapter 13 repayment plan is confirmed, any payments that were made by the debtors to the Chapter 13 trustee are returned to the debtors. 11 U.S.C. 1326(a)(2). As a result, the United States received no payments on its claim from the aborted Chapter 13 proceeding.

The day before the bankruptcy court entered its order closing petitioners' Chapter 13 case, petitioners filed a second petition for relief in bankruptcy. Pet. App. 2a-3a, 16a. That petition sought discharge of all eligible debts under Chapter 7. The bankruptcy court granted that discharge on June 17, 1997. *Id.* at 3a.[3]

b. Following the completion of the Chapter 7 case and the termination of the automatic stay, the government sought to collect the outstanding taxes owed by petitioners. Pet. App. 3a. In response, petitioners sought a determination from the bankruptcy court that their 1992 taxes, which were scheduled for full payment in the Chapter 13 case, were discharged in the Chapter 7 case. *Ibid.* Petitioners asserted that the taxes were discharged in that second bankruptcy case because, by the time that case was commenced, more than three years had elapsed since the due date of their 1992 tax return. Because, in petitioners' view, the three-year lookback period had elapsed, the 1992 taxes were not "priority" taxes under 11 U.S.C. 507(a)(8) and, consequently, were not excepted from discharge under 11 U.S.C. 523(a)(1)(A).

[3] Because petitioners had no assets available to satisfy their creditors, their bankruptcy proceeding was characterized as a "no-asset" Chapter 7 case. Pet. App. 3a. According to the IRS, during fiscal year 2000, the IRS was listed as a creditor or potential creditor in more than 315,000 Chapter 7 bankruptcy cases. Nearly 290,000 of those were no-asset cases.

The bankruptcy court rejected petitioners' contention. Pet. App. 14a-22a. The court "follow[ed] the well reasoned decisions in this circuit, as well as others" (*id.* at 19a), that the three-year lookback period was tolled during the period in which the automatic stay in the Chapter 13 bankruptcy case precluded the government from enforcing its claim. The court explained (*id.* at 19a-20a) that the three-year lookback period of Section 507(a)(8) operates as a statute of limitations and, as such, is tolled by the provisions of the Bankruptcy Code and Internal Revenue Code that toll the statutes of limitations for collection of tax claims when the automatic stay is in effect. *Id.* at 19a (citing 11 U.S.C. 108(c) and 26 U.S.C. 6503(b)). The court further emphasized that any other conclusion would result in "an absurd consequence unintended by Congress and would allow debtors to manipulate the bankruptcy system." Pet. App. 20a. The court explained that,

> [a]lthough the Court imputes no bad faith on the Plaintiffs, it is worth noting that the Defendant's claim was to be paid in full under the Plaintiff's Chapter 13 plan. Were the Court to allow this debt to be discharged, debtors could easily propose a plan to pay the Internal Revenue Service's claim in full under Chapter 13, dismiss their Chapter 13 case and file Chapter 7 to discharge the tax debt.

Ibid. "Such an easy loophole," the court concluded, "cannot be allowed," *ibid.*, because it "would circumvent wholly the IRS's three-year time period in which to collect taxes," *id.* at 21a.

The district court sustained the bankruptcy court's ruling. Pet. App. 12a-13a.

3. The court of appeals affirmed. Pet. App. 1a-10a. Deeming the three-year lookback period as "akin to a statute of limitations" (*id.* at 8a), the court of appeals concluded that, even in the absence of an express statutory tolling provision, courts may adopt a tolling rule "to assure that the underlying aims of Congress are not frustrated by conduct that thwarts" the plain purpose of the statute. *Id.* at 8a. The court noted that "[v]irtually all of the circuit cases dealing with successive bankruptcy petitions and the three-year lookback provision have chosen to" apply some type of tolling rule. *Ibid.* The court chose to "follow the majority view in favor of automatic tolling," because that rule avoids "taxpayer manipulation" of the bankruptcy process and preserves the "full three years" that Congress gave the government "to assess and collect taxes." *Id.* at 6a, 9a.

SUMMARY OF ARGUMENT

The court of appeals properly tolled the three-year lookback period for the collection of taxes in bankruptcy proceedings. The structure of the Bankruptcy Code and parallel provisions in the Internal Revenue Code manifest Congress's intent that the automatic stay in bankruptcy cases not deprive the government of an adequate time in which to seek recovery from delinquent taxpayers. The legislative history and the evolution of the relevant statutory provisions reconfirm Congress's understanding of the statutes' operation. The petitioners' proposed construction, by contrast, lacks any rational policy justification and would introduce unworkable anomalies into the operation of the Bankruptcy Code. It is inconceivable that Congress intended to legislate a scheme under which procedural legerdemain, rather than the recency of a tax obligation or the government's opportunity to pursue recovery, would dictate the defeasibility of an individual's duty to pay his fair share of taxes.

Tolling is consistent not just with the structure, purpose, and history of the controlling statutory provisions, but also with traditional principles of equitable tolling. Bankruptcy courts have their roots in equitable practice, and Congress has specifically preserved the bankruptcy courts' authority to issue equitable orders necessary to enforce the Bankruptcy Code's provisions. Equitable tolling of the three-year lookback period is appropriate because the government is legally barred from enforcing its claim during the prior bankruptcy proceeding and thus will be denied the time Congress provided for enforcement in the bankruptcy context. The public interest also weighs heavily in favor of tolling because it will prevent individuals' ready circumvention of their tax obligations and the attendant shifting of their tax burden to other taxpayers.

ARGUMENT

THE STRUCTURE, LEGISLATIVE HISTORY, AND PURPOSE OF THE BANKRUPTCY CODE AND ITS INTERNAL REVENUE CODE COMPLEMENT, ALONG WITH TRADITIONAL EQUITABLE PRINCIPLES, REQUIRE TOLLING OF THE THREE-YEAR LOOKBACK PERIOD

Through the various Bankruptcy and Internal Revenue Code provisions governing the enforcement of tax claims in bankruptcy proceedings, Congress struck a delicate balance between the debtor's obligation to pay his fair share of taxes, the debtor's need for a fresh start unsaddled by stale claims, the claims of competing creditors, and the government's need for a fair and adequate amount of time in which to prosecute unpaid tax claims. Petitioners, and countless debtors like them, have sought to unsettle that balance and escape payment of their taxes altogether through the mecha-

nism of serial bankruptcy filings. Debtors double-team the automatic stay and the prolonged proceedings under Chapter 13 to run down the government's three-year window for enforcing tax claims, then dismiss their cases and refile under Chapter 7, whereupon the debtors argue that the government's tax claims have been properly aged for discharge under the aegis of the automatic stay entered in the earlier bankruptcy proceeding(s). Attempts to use this tax-avoidance scheme have been widespread, in the experience of the IRS and as evidenced by the scores of published cases on the issue.[4]

Petitioners are unable to support their position by reference to congressional intent or the statutory purpose. Their only reference to congressional purpose focuses exclusively on the debtor's interest in a fresh start and the general interests of other creditors; petitioners overlook entirely the great weight Congress placed on ensuring the government a three-year period in which to collect tax claims. Nor do petitioners attempt to justify their vision of bankruptcy law as sensible policy. It has no sound basis. They simply

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[4] In an appendix to this brief, we provide a non-exhaustive list of some of the cases, beyond the court of appeals decisions discussed in this brief, in which the IRS has had to litigate this issue. According to the Internal Revenue Service, it participates as a creditor or potential creditor in more than 500,000 bankruptcy cases annually. In fiscal year 2000, the IRS submitted approximately 100,000 proofs of claim as a creditor in proceedings under Chapters 7, 11, and 13. The total value of those claims is estimated by the IRS to be $6 billion—$1.5 billion of which arises from Chapter 13 cases. While the IRS does not keep statistics tracking the use of this particular scheme, it advises that approximately 150 cases are currently pending that involve the use by taxpayers of serial bankruptcy filings to obtain a discharge of taxes without allowing the IRS three full years in which to collect those taxes

insist that courts are bound rotely to apply the textual provisions on which they rely. As every court of appeals that has addressed the issue has held, however, the statute does not leave courts so disabled.[5] Congress legislated against a backdrop of established statutory and equitable tolling principles that prevent expiration of the three-year lookback period under these circumstances.

[5] See *In re Palmer*, 219 F.3d 580 (6th Cir. 2000) (case-by-case equitable tolling); *In re Morgan*, 182 F.3d 775 (11th Cir. 1999) (per curiam) (presumptive equitable tolling); *In re Waugh*, 109 F.3d 489 (8th Cir.) (automatic tolling based on statutory structure), cert. denied, 522 U.S. 823 (1997); *In re Taylor*, 81 F.3d 20 (3d Cir. 1996) (automatic tolling based on statutory structure); *In re Quenzer*, 19 F.3d 163 (5th Cir. 1993) (case-by-case equitable tolling may be available); *In re West*, 5 F.3d 423 (9th Cir. 1993) (automatic tolling based on statutory structure), cert. denied, 511 U.S. 1081 (1994); *In re Richards*, 994 F.2d 763 (10th Cir. 1993) (automatic equitable tolling); *In re Montoya*, 965 F.2d 554 (7th Cir. 1992) (automatic tolling based on statutory structure). A leading treatise writer agrees that tolling is appropriate. 4 *Collier on Bankruptcy* ¶ 507.10[2][a], at 507-62 (Lawrence P. King ed., 15th ed. 2001) ("If, however, the debtor has been the subject of a bankruptcy case or cases during the three-year period, the three-year time period should be extended for the length of time that the automatic stay was in effect during the prior case or cases."); see also *ibid.* ("The reason for extending the reach-back period is to prevent a debtor from manipulating the bankruptcy process to escape tax liabilities. Without some kind of tolling of the relevant reach-back periods during the pendency of a case, a debtor would be able to escape liability for tax obligations by filing and dismissing multiple cases.").

A. The Structure, History, And Purpose Of The Relevant Statutory Provisions Manifest Congress's Intent That The Lookback Period Be Tolled While The Automatic Stay Is In Effect

1. The Structure and History of the Legislation.

As this Court has long recognized, there is a "broad public interest in maintaining a sound tax system," *United States* v. *Lee*, 455 U.S. 252, 260 (1982), and the collection of taxes is a compelling governmental interest, see *Hernandez* v. *Commissioner*, 490 U.S. 680, 699-700 (1989). Recognizing the important public interests at stake, Congress has taken measures to ensure that the government's assessment and collection efforts will not be impeded by bankruptcy proceedings

a. The 1966 compromise.

The assessment and collection of taxes has long been the object of special protections within bankruptcy proceedings. The rationale for such preferential treatment is that the taxing authority, whether state or federal, "is an involuntary creditor of the debtor" in that it "cannot choose its debtors, nor can it take security in advance of the time that taxes become due." H.R. Rep. No. 595, 95th Cong., 1st Sess. 190 (1977). In addition, "it takes a taxing authority time to locate and pursue delinquent tax debtors." *Ibid.* As a result, until 1966, unsecured tax claims were given priority over the claims of other unsecured creditors without regard to when the tax claims accrued. See 11 U.S.C. 35(a), 104(a)(4) (1964); H.R. Rep. No. 687, 89th Cong., 1st Sess. 2 (1965); S. Rep. No. 1158, 89th Cong., 2d Sess. 2 (1966). Tax debts were also not subject to discharge in bankruptcy regardless of their age. S. Rep. No. 1158, *supra*, at 2.

In the mid-1960s, Congress became concerned that tax claims were allowed to "accumulate and remain unpaid for long periods of time." S. Rep. No. 1158, *supra*, at 4. As a result, the debtor's "fresh start" was often burdened by "what may be an overwhelming liability for accumulated taxes." *Id.* at 2. In addition, Congress noted that the existing treatment of taxes saddled private creditors with the economic fallout from the bankruptcy. In Congress's view, it was only fair that "the Government as a creditor should bear part of the economic burden of business failures through the loss of some of its tax claims which it has allowed to accumulate over a long period of years." *Id.* at 4.

Accordingly, in 1966, Congress decided that it was appropriate to impose "some time limit upon the extent of taxes excepted from discharge," as well as on the time period for which tax claims retain priority over the claims of other creditors. S. Rep. No. 1158, *supra*, at 2, 4. That time limit—the three-year lookback period—provides that income taxes shall have priority for payment and retain their nondischargeable status only if the tax returns were due within "three years before the date of the filing of the petition." See Act of July 5, 1966, Pub. L. No. 89-496, 80 Stat. 270-271; see also 11 U.S.C. 507(a)(8)(A)(i), 523(a)(1)(A). Unless they qualify for special treatment under some other Bankruptcy Code provision (see, *e.g.*, 11 U.S.C. 523(a)(1)(B) and (C)), tax claims falling outside the three-year window are to be paid pro rata alongside the general unsecured claims of other creditors and are fully dischargeable at the close of the case. S. Rep. No. 1158, *supra*, at 1.

Congress anticipated that the balance it struck would "adequately safeguard[] the public's interest in the collection of revenues while at the same time limiting the impact of long accumulated, unsecured tax claims

on general creditors." H.R. Rep. No. 687, *supra*, at 4. In addition, Congress believed that "[t]he imposition of such a limitation" would spur "taxing authorities to act to prevent large accumulations of tax claims." *Ibid.*

Congress stressed, however, that the purpose of the legislation was not to "create a tax evasion device" or unduly impair the effectiveness of the government's tax collection efforts. S. Rep. No. 1158, *supra*, at 3-4. In fact, Congress believed that, by borrowing the three-year lookback period from the Internal Revenue Code's three-year statute of limitations on tax assessments, it would "discourage recourse to bankruptcy as a facile device for evading tax obligations." H.R. Rep. No. 687, *supra*, at 3.

b. The 1978 Bankruptcy Reform Act.

During enactment of the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, Congress revisited and reaffirmed the choice of the three-year priority and nondischargeability window accorded tax claims in the 1966 compromise legislation. The three-year lookback period, in Congress's view, fairly balanced the competing interests of

> (1) general creditors, who should not have the funds available for payment of debts exhausted by an excessive accumulation of taxes for past years; (2) the debtor, whose "fresh start" should likewise not be burdened with such an accumulation; and (3) the tax collector, who should not lose taxes which he has not had reasonable time to collect or which the law has restrained him from collecting.

S. Rep. No. 1106, 95th Cong., 2d Sess. 5 (1978); see also S. Rep. No. 989, 95th Cong., 2d Sess. 13-15 (1978); Staff of Jt. Comm. on Taxation, 95th Cong., 2d Sess., *Tax*

Aspects of S. 2266 (Bankruptcy Reform Act of 1978) 2-3 (Comm. Print 1978).

Congress understood that the three-year lookback period "gives the taxing authority three years to pursue delinquent debtors and obtain secured status," and, "[i]f a debtor files bankruptcy before that three-year period has run, the taxing authority is given a priority [in bankruptcy] in order to compensate for its temporarily disadvantaged position." H.R. Rep. No. 595, *supra*, at 190. That compromise fairly protected the interests of the taxpaying public at large, Congress concluded, because otherwise, "[t]o the extent that debtors in bankruptcy are freed from paying their tax liabilities, the burden of making up the lost revenues must be shifted to other taxpayers." S. Rep. No. 1106, *supra*, at 5. Congress thus reaffirmed its intent to avoid creating "[a]n open-ended dischargeability policy [that] would provide an opportunity for tax evasion through bankruptcy, by permitting discharge of tax debts before a taxing authority has an opportunity to collect any taxes due." H.R. Rep. No. 595, *supra*, at 190.

To ensure that the delicate balance it struck between taxing authorities and taxpayers/debtors would be preserved, Congress added Section 108(c) to the Bankruptcy Code in 1978. See 92 Stat. 2556-2557. Section 108(c) tolls the limitations period for a nonbankruptcy cause of action that has not yet run at the time the debtor's petition is filed. 11 U.S.C. 108(c). Congress crafted Section 108(c) "to minimize the administrative problems governmental tax authorities face, or may face, in collecting taxes in bankruptcy proceedings" and to "protect the right of governmental units (and other creditors) to collect debts which are not discharged in the bankruptcy proceeding" S. Rep. No. 989, *supra*, at

14-15. Section 108's purpose was to ensure that the time limitations on collecting a taxpayer's obligations would be suspended during the period in which an automatic stay in bankruptcy proceedings precluded enforcement of the government's claim, so that the taxing authority would have "adequate time to collect nondischargeable taxes following the end of the title 11 proceedings." *Id.* at 30-31. In fact, Congress stressed that "[t]he priority should apply if assessment or collection is stayed" because "the taxing authority has not had an adequate opportunity to assess or collect the taxes." H.R. Rep. No. 595, *supra*, at 191

c. The 1980 Tax Code Amendment.

Two years after the Bankruptcy Code was enacted, Congress inserted a counterpart to the bankruptcy tolling provision (11 U.S.C. 108(c)) into the Internal Revenue Code. See Bankruptcy Tax Act of 1980, Pub. L. No. 96-589, § 6(a), 94 Stat. 3389. Section 6503(h) tolls the Internal Revenue Code's time limits on the assessment and collection of taxes during the period that a debtor is under the protection of the bankruptcy court. 26 U.S.C. 6503(h). That amendment was deemed necessary to ensure that,

> [if] the Internal Revenue Service is prohibited for a period of time by reason of a bankruptcy case from assessment or collection of tax (for example, because of the automatic stay under new 11 U.S. Code sec. 362(a)(6)), the running of the period of limitations is suspended for assessment, for the prohibition period and for 60 days thereafter; and for collection, for the prohibition period and for six months thereafter.

S. Rep. No. 1035, 96th Cong., 2d Sess. 50-51 (1980).

Thus, taken as a whole, (i) the Chapter 13 requirement that debtors fully pay tax claims falling within the three-year lookback period (11 U.S.C. 1322(a)(2)), (ii) the Chapter 7 rules (11 U.S.C. 726(a)(1), 727(b)) requiring that those same tax claims be accorded priority for payment and be immune from discharge (and thus fully collectible post-bankruptcy), and (iii) the complementary tolling provisions in 11 U.S.C. 108(c) and 26 U.S.C. 6503(h), textually embody Congress's intent that income tax claims falling within the three-year lookback period either be satisfied within or preserved through the bankruptcy case. Indeed, it was only on those terms that Congress decided, in the 1966 legislative compromise, to forgo the priority and nondischargeability previously accorded to all tax claims regardless of age.

Congress, moreover, took steps to restrict the opportunities for serial bankruptcy filings and to ensure that they would not disrupt the three-year lookback period. Chapter 7 discharges must be separated by six years, which is twice the length of the lookback period. 11 U.S.C. 727(a)(8). A Chapter 7 discharge may not follow a Chapter 13 discharge by less than six years, unless the debtor in the Chapter 13 proceeding paid all of his unsecured claims or paid 70% of them and the plan represented his "best effort" to pay those creditors. 11 U.S.C. 727(a)(9). See also 11 U.S.C. 727(a)(8) (Chapter 11 and Chapter 7 discharges must be separated by six years). Thus, in Congress's view, the Bankruptcy Code that it enacted adequately secured implementation of its intent that non-stale tax claims be paid.

2. The Bankruptcy Code Reflects Congress's Intent that the Three-Year Lookback Period Be Tolled.

a. Courts must consider statutory structure and purpose.

Despite Congress's concerted legislative efforts, by the mid-1980s, debtors had devised a means of skirting Congress's requirement that tax claims falling within the lookback period be paid, through the serial filing and dismissal before discharge of Chapter 13 and Chapter 7 bankruptcies. Most frequently, debtors would file a Chapter 13 petition, which would trigger the automatic stay and halt the government's tax collection efforts. The lengthy proceedings under Chapter 13 would allow the debtor to exhaust the government's three-year lookback period and then dismiss the Chapter 13 case before discharge. In cases where dismissal took place before a plan was confirmed, as occurred here, money paid to the trustee to satisfy the tax claim generally would be returned to the debtor. In addition, because the debtor's dismissal would predate the entry of a discharge in the Chapter 13 proceeding, the statutory requirement that the debtor wait six years before proceeding under Chapter 7 would be circumvented, and the debtor could file a Chapter 7 petition claiming a full discharge of the allegedly now-stale tax claims.[6]

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[6] Petitioners' assertion (Br. 28) that debtors "find it difficult to * * * tread water" in Chapter 13 proceedings for three years is belied by the facts of this case, their earlier acknowledgment (Br. 22) that "reorganization cases can last years," and the abundance of Bankruptcy Court and court of appeals cases dealing with precisely such circumstances. See note 4, *supra*; App., *infra*, 1a-4a. See also, *e.g.*, *In re Hoppe*, 259 B.R. 852, 856 (Bankr. E.D. Tex. 2001) ("[P]ublic policy concerns and simple notions of fairness suggest that the Bankruptcy Code was not promulgated as a

Relying primarily on the fact that none of the relevant statutory provisions explicitly require tolling of the lookback period, petitioners argue that the Bankruptcy Code mandates a full discharge and the "shift[ing] to other taxpayers" (*Tax Aspects of S. 2266* at 2) of their unpaid tax claims. It is clear, however, that all of the relevant statutory provisions contemplate that such tolling will occur, either by providing for analogous tolling explicitly or by according special

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means to thwart creditors, such as the IRS, by the filing of successive petitions and was not designed to allow debtors to create a scheme of bypassing the [C]ode's non-dischargeability provisions by filing a petition, letting the priority period expire, dismiss their case, and refile again (in order to discharge the taxes), thereby making themselves unreachable by the IRS.") (internal quotation marks omitted); *In re Bair*, 240 B.R. 247, 253 (Bankr. W.D. Tex. 1999) ("If the Debtors had not filed a second bankruptcy 193 days after dismissal of the Chapter 13 case, the IRS would have been able to collect the taxes due within the limitations periods and without having to confront the dischargeability issue. This Court will not allow the Bankruptcy Code to be utilized as an implement to evade creditors simply by the timing of successive bankruptcy filings.") (citations omitted); *In re Hollowell*, 222 B.R. 790, 792 (Bankr. N.D. Miss. 1998) ("In the opinion of the court, the dismissal and refiling were done purposeley [*sic*] to circumvent the effect of the two year limitations period."); *In re Miller*, 199 B.R. 631, 634 (Bankr. S.D. Tex. 1996) ("[I]t appears that the Second Bankruptcy was filed to thwart the IRS' notice of intent to levy; and consequently to shield themselves from any meaningful attempt to address their 1986 tax liability via the protection of the automatic stay."); *In re Clark*, 184 B.R. 728, 732 (Bankr. N.D. Tex. 1995) ("While homestead foreclosure prevention motivated, to some extent, the filing of the four bankruptcies * * * it appears that such bankruptcies were likewise used to shield Debtors from any attempt to meaningfully address, in any bona fide manner whatsoever, their 1987-88 tax liability.").

status to tax claims based on the amount of time the government has had to enforce them.

Indeed, the manner in which Congress structured the relevant Code provisions gave Congress no reason to assume that separately tolling the lookback period was necessary. The lookback period is triggered only by the actual filing of a bankruptcy petition. The ripeness of tax claims is measured from the time of that petition's filing. In addition, the bankruptcy process that the petition commenced, whether under Chapter 7 or Chapter 13, would by its very terms require full satisfaction or preservation of all tax claims falling within the lookback period. Finally, the complementary tolling provisions in the Bankruptcy and Internal Revenue Codes were designed to preserve the three-year enforcement window for the government during the bankruptcy proceeding. It is only the unanticipated use of premature Chapter 13 dismissals, coupled with a follow-up second bankruptcy filing, that has created the current tax evasion problem.

The asserted gap in the tax-specific provisions of the Bankruptcy Code that petitioners seek to exploit thus is not a result of congressional oversight or avoidance of a problem that was either known or reasonably foreseeable to Congress at the time it passed the Code. Nor is it a product of deliberate congressional omission or of legislative neglect. It is the result of debtors' creativity in claiming loopholes in a statutory scheme that Congress labored to protect from such circumventions. There is a limit to how many contingencies Congress can be expected to anticipate and how many holes it may foresee the need to plug in advance in the laws it enacts. This Court accordingly has recognized that statutes must be construed in light of their overall structure, history, and purpose. See *Chickasaw Nation*

v. *United States*, No. 00-507, 2001 WL 1488017, at *5 (Nov. 27, 2001) (construing statute in light of its overall structure, purpose, and "common sense"); *El Al Israel Airlines, Ltd.* v. *Tsui Yuan Tseng*, 525 U.S. 155, 169 (1999) (construing law in light of its "text, purpose, and overall structure").[7]

Indeed, "[i]t is a well-established canon of statutory construction that a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute." *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 586 (1983). Courts retain the authority to "fill[] a gap left by Congress' silence." *United States* v. *Locke*, 471 U.S. 84, 95 (1985). See also, *e.g.*, *Chickasaw Nation*, 2001 WL 1488017, at *7 (reading statutory provision as surplusage rather than adopting an interpretation that "would conflict with the intent embodied in the statute Congress wrote"); *Hallstrom* v. *Tillamook County*, 493 U.S. 20, 28-29 (1989) (noting that there are "rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters"); *Green* v. *Bock Laundry Mach. Co.*, 490 U.S. 504, 509 (1989) (disregarding a statute's "plain language

[7] See also *United States Nat'l Bank of Oregon* v. *Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993) ("Statutory construction 'is a holistic endeavor'" that must take into account not just text, but also a statute's "structure[] and subject matter."); *Johnson* v. *Home State Bank*, 501 U.S. 78, 83 (1991) (question of statutory construction under Bankruptcy Code is "to be resolved by reference to the text, history, and purpose of the Bankruptcy Code") (internal quotation marks omitted); see also *Helvering* v. *Gregory*, 69 F.2d 809, 810-811 (2d Cir. 1934) (L. Hand, J.) ("[T]he meaning of a [statute] may be more than that of the separate words, as a melody is more than the notes."), aff'd, 293 U.S. 465 (1935).

command[]" where "that literal reading would compel an odd result"); *id.* at 527-528 (Scalia, J., concurring) (finding it "entirely appropriate to consult all public materials, including the background of [the rule] and the legislative history of its adoption, to verify that what seems to us an unthinkable disposition * * * was indeed unthought of, and thus to justify a departure from the ordinary meaning").

Honda v. *Clark*, 386 U.S. 484 (1967), illustrates the principle. There the Court held that a time limit for filing claims under the Trading with the Enemy Act, which was modeled on the Bankruptcy Act (*id.* at 495-496), was subject to tolling. Even though the statutory text there, as here, was silent, the Court held that "the statutory scheme itself requires tolling the limitation period during the pendency of [related] litigation," *id.* at 500. The Court deemed it sufficient to adopt such a construction that tolling was "much more consistent with the overall congressional purpose" and was "nowhere eschewed by Congress." *Id.* at 501; see also *id.* at 498 (tolling comports with the "repeated and uncontested expressions of congressional intent to facilitate and expand the rights of American creditors having an interest in these assets").

A focus on legislative purpose is particularly appropriate when addressing taxpayer efforts to manipulate statutory terms to circumvent their tax obligations. In *Gregory* v. *Helvering*, 293 U.S. 465 (1935), a taxpayer created a sham corporation to avoid paying taxes on a stock distribution. This Court held that, although the transaction fell within the letter of the law, it was "in fact an elaborate and devious form of conveyance masquerading as a corporate reorganization," and it therefore fell "outside the plain intent of the statute." *Id.* at 470; see also *Superintendent of Five Civilized*

Tribes v. *Commissioner*, 295 U.S. 418 (1935) (upholding taxation where congressional intent reasonably clear); *Choteau* v. *Burnet*, 283 U.S. 691 (1931) (same). Petitioners' manipulation of the Code likewise would frustrate Congress's intent to give the government a full three years to collect taxes and would impose an irrational operation on the statute by transforming it into a road map for tax-avoidance.

Further, what petitioners advocate, reduced to its essence, is a holding that, through omission, Congress enacted an implicit exemption from recent income taxes for individuals who play their procedural cards right in bankruptcy. This Court, however, recently "warn[ed] * * * against interpreting federal statutes as providing tax exemptions unless those exemptions are clearly expressed." *Chickasaw Nation*, 2001 WL 2488017, at *7.

b. Petitioners' Interpretation Would Create Anomalies and Inconsistencies.

In *United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235 (1989), this Court explained that courts may confine their construction of the Bankruptcy Code to the statutory text only "as long as the statutory scheme is coherent and consistent." *Id.* at 240. But the construction petitioners propose is neither coherent nor consistent with other Code provisions.

As an initial matter, there is no rational basis for concluding that Congress, after formulating a carefully balanced compromise of tax liabilities and legislating a number of provisions designed to effectuate that balance, simultaneously intended to permit ready circumvention of those tax liabilities through serial bankruptcy filings. The balance that Congress struck guaranteed federal, state, and local taxing authorities

three years to collect income taxes; petitioners' position would permit discharge of those taxes before the government has the benefit of those three years. Yet petitioners offer no rational basis for concluding that Congress intended to take away with one hand what it gave with the other.[8]

In addition, petitioners' construction would create untenable anomalies and inconsistencies within the Bankruptcy Code. First, under Section 1307 of the Bankruptcy Code, a debtor or the bankruptcy court may convert a case from a Chapter 13 proceeding to a Chapter 7 proceeding. 11 U.S.C. 1307(a) and (c). If the case is converted, however, the lookback period continues to be measured from the time of the filing of the original petition, rather than from the conversion date.[9] Petitioners offer no explanation for why taxes should remain nondischargeable when cases are formally converted, but suddenly be rendered dischargeable

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[8] Petitioners' argument (Br. 21-25) that the IRS can sometimes successfully collect taxes during an earlier bankruptcy proceeding proves the point. The proceedings to which petitioners refer are *completed* bankruptcies where the taxes are paid as required by Chapter 13 or given priority and protected from discharge under Chapter 7. This shows that the provisions Congress enacted, when carried to completion, work to preserve priority tax claims as Congress intended. When a Chapter 13 proceeding is dismissed before confirmation of a plan, as occurred here, however, all of the interim payments that the debtor made to the trustee (see Pet. Br. 22) are returned to the debtor. The government, as in this case, is unable to collect a penny on its debt.

[9] See *In re Eysenbach*, 170 B.R. 57 (Bankr. W.D.N.Y. 1994), rev'd on other grounds, 183 B.R. 365 (W.D.N.Y. 1995); *In re Cross*, 119 B.R. 652 (Bankr. W.D. Wis. 1990); *In re Bailey*, 111 B.R. 151 (Bankr. W.D. Tenn. 1988); see also 4 *Collier on Bankruptcy*, *supra*, ¶ 507.10[2][a], at 507-61; *id.* ¶ 523.07[2][a], at 523-529.

through the de facto conversion accomplished by dismissal and refiling.

Petitioners counter (Br. 13) that Section 523(b) of the Bankruptcy Code permits discharge of debts in a later bankruptcy that were "excepted from discharge" in an earlier proceeding. 11 U.S.C. 523(b). That provision, however, actually undercuts petitioners' argument. Section 523(b), by its terms, applies only when the earlier bankruptcy proceeding was prosecuted to a conclusion, resulting in an actual discharge. Once such a discharge occurs, the six-year time limits on filing second bankruptcy petitions are triggered. See 11 U.S.C. 727(a)(8) and (9). That intervening six years, of course, would far surpass the three years available to the Internal Revenue Service under the lookback provision and would render any lingering tax claims dischargeable. Rather than support petitioners' position, then, Section 523(b) demonstrates that Congress expected tax claims to be discharged through serial filings only where the government had been afforded ample time to pursue its tax claims free from the automatic stay in the intervening years.

Second, as petitioners note (Br. 16-17), the 240-day time limit on collection of taxes subject to an "offer in compromise" with the Internal Revenue Service is tolled during pendency of the offer in compromise.[10] Congress added that tolling provision in 1978 when it learned that taxpayers were using the offer in compromise process—just as petitioners are using serial bankruptcy filings here—to circumvent the three-year lookback period. "[S]omé taxpayers," the Senate Report explained in words that echo the problem here, "have submitted a formal offer in compromise, dragged out negotiations with the taxing authority until the tax liability would lose priority under the three-year priority period, * * * and then filed in bankruptcy before the governmental unit could take tax[] collection steps." S. Rep. No. 989, *supra*, at 70-71; see also S. Rep. No. 1106, *supra*, at 15 n.11.

[10] An "offer in compromise" is an administrative agreement between the taxpayer and the Service in which the Service agrees to collect less than the entire amount of taxes due because a taxpayer is unable to make full payment, and the taxpayer agrees to either the immediate payment of that compromised amount or to pay that amount over time.

Petitioners insist that Congress's inclusion of that tolling provision for taxes subject to an offer in compromise, and the absence of a parallel tolling provision in the three-year lookback provision, demonstrates an intended dichotomy between "which taxes are dischargeable and which are not" (Pet. Br. 17). But Congress already drew that line in 1966 based on the age of the taxes and the length of time available to the IRS to collect, not on the procedural posture of the bankruptcy proceedings. There is no rational basis for concluding, as petitioners posit, that Congress amended the Code in 1978 to subdivide those taxes into truly nondischargeable taxes (those subject to an offer in compromise) and nondischargeable taxes that could be readily circumvented through serial filings (those not subject to such an offer). Nor have petitioners identified any reason why Congress, after the 1978 amendment, would have wanted to perpetuate the tax liabilities of debtors who, prepetition, cooperate with the IRS in a good faith effort to meet their tax obligations through an offer in compromise, while rewarding those who undertake no such efforts with a procedural release from nondischargeability. Rather, Congress amended the Code in 1978 to shore up the various

statutory provisions preserving liability for ripe tax claims by barring the one tax avoidance scheme that was brought to its attention. S. Rep. No. 989, *supra*, at 71 ("This rule closes [that] loophole.").[11]

Third, petitioners' approach would create a disincentive for debtors to fulfill their obligations under Chapter 13. Following a holding by this Court that taxes can be readily discharged through the medium of serial filings and well-timed dismissals, debtors' counsel will likely advise their clients that completing the Chapter 13 process will perpetuate their tax liabilities, whereas an appropriately timed dismissal and refiling under Chapter 7 will absolve the debtor of tax liabilities. The proposed interpretation thus would reward those who attempt to evade their taxes, while financially penalizing those who see their Chapter 13 proceedings through to the end.

[11] Congress has attempted explicitly to remedy the problem presented in this case. A bill passed Congress last year that was "intended to strongly limit the practice of using bankruptcy filings and the automatic stay that arises under section 362 to abuse the bankruptcy process" and to codify the court decisions tolling the three-year lookback period. S. Conf. Rep., 146 Cong. Rec. S11,708 (daily ed. Dec. 7, 2000), *available at* 2000 WL 1796598 (section-by-section explanation of H.R. 2415). That bill, which also contained a variety of controversial, unrelated provisions, was pocket-vetoed. As we advised the Court in our brief at the petition stage, the House and Senate have passed bills again this year that would codify the rule that the three-year lookback period is tolled for the period of an automatic stay entered in a prior bankruptcy proceeding. See H.R. 333, 107th Cong., 1st Sess. § 705 (2001); S. 420, 107th Cong., 1st Sess. § 705 (2001). The House and Senate appointed conferees to resolve the differences between the competing bankruptcy reform bills, none of which pertain to the tolling issue. The conferees were originally scheduled to meet on September 12, 2001, but that meeting was postponed due to the events of September 11th. On November 7, 2001, the conferees held their first meeting. We will continue to advise the Court of any legislative developments pertinent to this case.

Nor can petitioners substantiate their contention (Br. 13-16) that Congress intended the result they advance. That is because their analysis tells only half of the legislative story. Petitioners' argument focuses entirely on the debtor's interest in a fresh start and the general interests of other creditors. See *ibid.* But the entire purpose of the 1966 tax compromise was to strike a *three-way* balance between the interests petitioners identify and the preservation of federal and state tax claims, based on their recency and the government's opportunity for enforcement. See S. Rep. No. 1106, *supra*. at 5; S. Rep. No. 989, *supra*, at 13-15; *Tax Aspects of S. 2266*, *supra*, at 2-3. Because petitioners' argument ignores one of the most pressing concerns underlying the relevant statutory provisions, it lacks any solid grounding in congressional intent.

In short, relying solely on the absence of particular language in the statutory text, petitioners have exploited a perceived lacuna in the Bankruptcy Code. Allowing that asserted discontinuity to begin and end the construction of the statute, however, would be inconsistent with the overall structure of the Bankruptcy Code, would conflict with "other section[s] of the Code," would be "in clear conflict with state or federal laws of great importance," and is belied by the legislative history. *Ron Pair*, 489 U.S. at 243, 245; see also *id.* at 249 (O'Connor, J., concurring) ("The notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification.") (quoting *United States* v. *Monia*, 317 U.S. 424, 431 (1943) (Frankfurter, J., dissenting)). Further, petitioners' argument forgets that the canons of statutory construction on which they rely "are not mandatory

rules" and "need not be conclusive." *Chickasaw Nation*, 2001 WL 1488017, at *7. Rather, they are "designed to help judges determine the Legislature's intent"; "other circumstances evidencing congressional intent can overcome their force." *Ibid.* In this case, the statutory structure, reasonable operation of the statute as a whole, congressional intent, and the legislative history unite to defeat petitioners' focus on a congressional failure to anticipate a blatant manipulation of statutory language.

B. Traditional Principles Of Equitable Tolling Prevent The Running Of The Three-Year Lookback Period

1. Equitable Tolling is Appropriate Because of the Nature of the Lookback Period, the Legal Prohibition on Governmental Enforcement, Congressional Purpose, and the Public Interest.

Bankruptcy courts are courts of equity and, as such, may exercise general equitable powers in a manner consistent with the Bankruptcy Code.[12] Congress, moreover, expressly granted bankruptcy courts the broad power to issue "any order * * * that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. 105(a). In *Johnson* v. *Home State*

[12] See *United States* v. *Energy Res. Co., Inc.*, 495 U.S. 545, 549 (1990) (noting the "traditional understanding that bankruptcy courts [are] * * * courts of equity"); *Katchen* v. *Landy*, 382 U.S. 323, 336 (1966) ("[T]he proceedings of bankruptcy courts are inherently proceedings in equity."); *Pepper* v. *Litton*, 308 U.S. 295, 305 (1939) (bankruptcy courts' equitable powers "have been invoked to the end that fraud will not prevail, that substance will not give way to form, that technical considerations will not prevent substantial justice from being done").

Bank, *supra*, this Court indicated that the "broad equitable power" accorded bankruptcy courts by Section 105(a) empowers them to combat abuses that arise from serial bankruptcy filings. 501 U.S. at 88. That role is consistent with the historical understanding that, "[i]n the exercise of its equitable jurisdiction the bankruptcy court has the power to sift the circumstances surrounding any claim to see that injustice or unfairness is not done in administration of the bankrupt estate." *Pepper* v. *Litton*, 308 U.S. 295, 307-308 (1939).[13]

One of the most familiar components of equity jurisprudence is the doctrine of equitable tolling. Courts have long recognized that, "[w]here the plaintiff is prevented from filing timely suit by force of law, it is manifestly unjust to penalize him by barring the suit," and courts accordingly "have consistently implied a suspension of the limitations statute for the period of prohibition." *Developments in the Law—Statutes of Limitations*, 63 Harv. L. Rev. 1177, 1233 (1950). Indeed, this Court has held that time limits in federal statutes for filing claims are presumptively subject to equitable tolling. See, *e.g.*, *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 95 (1990) ("Time requirements in lawsuits between private litigants are customarily subject to 'equitable tolling.'"); *Hallstrom*, 493 U.S. at 27; *Locke*, 471 U.S. at 94 n.10 ("Statutory filing deadlines are generally subject to the defenses of waiver, estoppel, and equitable tolling."). So venerable

[13] See also 2 *Collier on Bankruptcy*, *supra*, ¶ 105.01[2], at 105-8.1 ("The equitable origins of the bankruptcy power suggest substantial leeway to tailor solutions to meet the diverse problems facing bankruptcy courts. Section 105 gives the bankruptcy court the power to fill in gaps and further the statutory mandates of Congress in an efficient manner.").

is the practice that even waivers of sovereign immunity are presumed to incorporate the practice. *Irwin*, 498 U.S. at 95. That is because the assumption that Congress intended equitable tolling to be available in a statute "is likely to be a realistic assessment of legislative intent as well as a practically useful principle of interpretation" of statutes. *Ibid.*; see also *Midlantic Nat'l Bank* v. *New Jersey Dep't of Envtl. Prot.*, 474 U.S. 494, 501 (1986) ("The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific. * * * The Court has followed this rule with particular care in construing the scope of bankruptcy codifications.").[14]

Finally, the equitable tolling doctrine can appropriately be applied to the three-year lookback period even if the Court concludes that the statute, standing alone, does not require tolling. See *Greyhound Corp.* v. *Mt. Hood Stages, Inc.*, 437 U.S. 322, 336-337 & n.21 (1978); see also *id.* at 338 (Burger, C.J., concurring).

[14] Petitioners contend (Br. 28) that the availability of equitable tolling under Section 105(a) is not properly before the Court because the lower courts did not rely on that Section of the Code. The government, however, presented the argument to the bankruptcy court, and repeated that argument to the court of appeals. See Mem. of Law in Supp. of the United States' Mot. for Summ. J. 11-13; Gov't C.A. Br. 31-37. We also discussed the argument in our brief at the petition stage before this Court. See Gov't Br. 2, 13-14. Furthermore, the petitioners, in their certiorari petition, and the government, in its acquiescence, both broadly framed the issue presented in this case as whether tolling of the three-year lookback period was appropriate, without excluding consideration of any particular statutory provision or other source of authority.

a. The lookback period is the type of time limit that is subject to equitable tolling.

The lookback period is the type of time requirement that courts traditionally have found to be subject to equitable tolling. Indeed, in many respects, it is the functional equivalent, in the unique context of bankruptcy proceedings, of a statute of limitations or a "[s]tatutory filing deadline[]" (*Locke*, 471 U.S. at 94 n.10). First, the lookback period "prevent[s] the pressing of 'stale' claims," which is "the end served by a statute of limitations." *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982). Second, the lookback period is measured from the due date of the legal obligation to file the tax return. See *Hallstrom*, 493 U.S. at 27 (statutes of limitations are generally "triggered by the violation giving rise to the action"). Furthermore, Congress discussed the lookback period as tantamount to a limitations period for collecting the unpaid tax. See, *e.g.*, H.R. Rep. No. 595, *supra*, at 190 ("The Bankruptcy Act gives the taxing authority three years to pursue delinquent debtors and obtain secured status."). Third, by authorizing discharge of stale claims, the lookback period forecloses such claims virtually as completely as a time bar on filing suit. Fourth, nothing in the lookback period's phraseology or structure suggests that Congress intended to foreclose tolling.[15]

[15] "Equitable tolling is not permissible where it is inconsistent with the text of the relevant statute." *United States* v. *Beggerly*, 524 U.S. 38, 48 (1998). See also *United States* v. *Brockamp*, 519 U.S. 347, 350 (1997) (equitable tolling not available where unique language and design of statutory provision was designed to foreclose it).

The lookback period is thus comparable to the other types of nontraditional time limits, both within and outside bankruptcy, to which equitable tolling has been applied. See, *e.g.*, *Irwin*, 498 U.S. at 92, 95 (equitable tolling applied to requirement that Title VII suit be filed within 30 days of receipt of notice of final action by the Equal Employment Opportunity Commission); *Zipes*, 455 U.S. at 393 (timely filing of a Title VII claim with the Equal Employment Opportunity Commission is a "requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling"); *Honda*, 386 U.S. at 494-500 (time limit for filing claims under the Trading with the Enemy Act, which was modeled on the Bankruptcy Act, is subject to equitable tolling); cf. *Nassau Smelting & Refining Works, Ltd.* v. *Brightwood Bronze Foundry Co.*, 265 U.S. 269, 273 (1924) (failure of creditor to prove claim within one-year statutory period does not preclude its participation in a composition plan).

Moreover, construing the lookback period as the type of statutory time limit traditionally subject to equitable tolling comports with the general principle that time limits "sought to be applied to bar rights of the Government[] must receive a strict construction in favor of the Government." *Badaracco* v. *Commissioner*, 464 U.S. 386, 391 (1984); see also *Brown* v. *Duchesne*, 60 U.S. (19 How.) 183, 195 (1856) ("Neither will the court, in expounding a statute, give to it a construction which would in any degree disarm the Government of a power which * * * would enable individuals to embarrass it, in the discharge of the high duties it owes to the community—unless plain and express words indicated that such was the intention of the Legislature."). That is particularly true when the time limit "bar[s] the collection of taxes otherwise due and unpaid." *Badaracco*, 464 U.S. at 392 (internal quotation marks omitted).

Petitioners counter (Br. 17) that the three-year period substantively defines which taxes are dischargeable. They are mistaken. For the federal government, the source of the substantive right to collect the taxes is the Internal Revenue Code. See generally 26 U.S.C. 6301-6344 (1994 & Supp. V 1999). When Congress adopted the three-year lookback period in the Bankruptcy Code, it did so not to alter the government's substantive right to the taxes (whether within or outside bankruptcy). Rather, it enacted the lookback period to establish a time frame that would "adequately safeguard[] the public's interest in the collection of revenues" within the bankruptcy context. H.R. Rep. No. 687, *supra*, at 4. See also S. Rep. No. 989, *supra*, at 31 (lookback period gives government "adequate time to collect nondischargeable taxes"); H.R. Rep. No. 595, *supra*, at 190 (the three-year lookback "gives the taxing authority three years to pursue delinquent debtors"). Indeed, a House Report emphasized that "[t]he priority should apply if assessment or collection is stayed" because "the taxing authority has not had an adequate opportunity to assess or collect the taxes." H.R. Rep. No. 595, *supra*, at 191. Congress, in fact, chose the three-year "time limit" because it "coincides with the 3-year statute of limitations for assessments in Federal income tax cases." H.R. Rep. No. 687, *supra*, at 2.

Even if the time limit were deemed to be "substantive," courts have often applied equitable tolling to such time limits in the narrow circumstances where an official prohibition or analogous event beyond the party's control—such as the automatic stay—prevents pursuit of the claim. "The proper test is not whether a time limitation is 'substantive' or 'procedural,' but

whether tolling the limitation in a given context is consonant with the legislative scheme." *American Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538, 557-558 (1974).[16] As discussed earlier, tolling of the lookback period is wholly "consonant with the legislative scheme." *Ibid.*

Thus, the three-year lookback period (i) is phrased like a time limit on collection through the medium of bankruptcy proceedings, because "[t]he sole function of assigning priority to certain tax claims is to enhance the government's ability to collect those claims" (*In re West*, 5 F.3d 423, 426 n.7 (9th Cir. 1993), cert. denied, 511 U.S. 1081 (1994)), (ii) operates like a time limit in practice since "collectibility is obviously useless if the tax debt has been discharged" (*In re Brickley*, 70 B.R. 113, 115 (BAP 9th Cir. 1986)), and (iii) is expressly modeled on another statute of limitations. The lookback time period thus sounds in terms that are traditionally subject to equitable tolling. See *Pepper*, 308 U.S. at 305 n.11 (equitable tolling of time limit on when claims can be proved against the bankrupt estate).

b. Debtors cannot claim a lack of diligence on the part of the government.

Equitable tolling is appropriate "in situations where the claimant has actively pursued his judicial remedies." *Irwin*, 498 U.S. at 96. For purposes of the statutory provisions at issue here, Congress itself has defined, through the three-year lookback period, the appropriate time frame within which the government can reasonably be expected to enforce its tax claims in bankruptcy. All cases in which equitable tolling of the

[16] See also *McCormick* v. *United States*, 680 F.2d 345, 349 (5th Cir. 1980); *Whittaker* v. *Whittaker Corp.*, 639 F.2d 516, 527-528 (9th Cir.), cert. denied, 454 U.S. 1031 (1981); *Statutes of Limitations*, *supra*, 63 Harv. L. Rev. at 1235 & n.478.

lookback period is sought will, by definition, involve claims for which the government has been denied the lookback period's three years. During the pendency of earlier bankruptcy proceedings, it would be the operation of the automatic stay, rather than any foot dragging on the part of the government, that would prevent timely enforcement of the tax claim. In short, serial bankruptcy filings present prototypical circumstances for the application of equitable tolling, because the government "has not slept on [its] rights, but, rather, has been prevented from asserting them." *Burnett* v. *New York Cent. R.R.*, 380 U.S. 424, 429 (1965).

c. Congressional purpose and public policy support tolling.

Equitable tolling is wholly consonant with congressional intent. See *Burnett*, 380 U.S. at 427 ("[T]he basic inquiry" in determining whether equitable tolling is available "is whether congressional purpose is effectuated by tolling."). Congress's desire to preserve ripe tax claims and to ensure either their satisfaction within bankruptcy or their preservation through bankruptcy emanates from every corner of the Bankruptcy Code. Equitable tolling would likewise advance the strong public policy interest in protecting the government's claim to taxes and ensuring that all citizens bear their fair share of the tax burden.

Petitioners' reliance on *United States* v. *Noland*, 517 U.S. 535 (1996), is thus misplaced. In *Noland*, this Court held that bankruptcy courts may not employ equitable subordination to reorder the payment priorities established by Congress in the Bankruptcy Code. *Id.* at 540-541. The Court explained that, to subordinate the tax penalty, would "run[] directly counter to

Congress's policy judgment that a postpetition tax penalty should receive the priority of an administrative expense." *Id.* at 541. The application of equitable tolling to the lookback period, by contrast, fully implements congressional intent and preserves the payment priority and nondischargeability status that Congress afforded ripe tax claims.

2. A Uniform Rule of Tolling Should Be Adopted.

Equitable tolling should apply uniformly in all cases where the automatic stay entered in a debtor's earlier bankruptcy proceeding denied the government its full three years to pursue the tax claim. This Court has found adoption of such uniform tolling rules to be appropriate where their application is "fair to both plaintiff and defendant, carries out the purposes of the [statute], and best serves the policies of uniformity and certainty underlying the federal limitation provision." *Burnett*, 380 U.S. at 435-436; see also *Bowen* v. *City of New York*, 476 U.S. 467, 479-480 (1986) (adopting class-wide rule of equitable tolling).

This is such a case. As the Tenth Circuit observed in *In re Richards*, 994 F.2d 763 (1993), the relevant equitable considerations tilt so strongly in favor of the government that a universal rule of equitable tolling, rather than case-by-case application, is appropriate. *Id.* at 764.[17] Because equitable tolling would give the government only the amount of enforcement time that Congress promised it in the Bankruptcy Code, cases are unlikely to arise where the government will not have been sufficiently diligent to merit tolling.

[17] The Eleventh Circuit also appears to apply a presumption that tolling is appropriate if the debtor's earlier bankruptcy case prevented the government from collecting taxes during the three-year lookback period. See *Morgan*, 182 F.3d at 780.

Furthermore, tolling does not afford the government any time beyond what Congress prescribed to enforce the tax claim, so it is not unfair to debtors. Nor will the congressional purpose or public interest calculation change demonstrably from case to case. In addition, adopting a case-by-case approach to tolling would tend to encourage serial bankruptcy filings by debtors in the hope that a bankruptcy court ultimately will find, for whatever reason, that the equities favor discharge of their claim. See *United States* v. *Brockamp*, 519 U.S. 347, 352 (1997) ("Tax law, after all, is not normally characterized by case-specific exceptions reflecting individualized equities.").

The Sixth Circuit considered case-by-case tolling to be appropriate because it thought that the bad faith or manipulative intent of the debtor was determinative. See *In re Palmer*, 219 F.3d 580, 587 (6th Cir. 2000). Courts within the Fifth Circuit similarly seem to permit tolling only when the debtor has acted in a calculated manner in dismissing and re-filing bankruptcy cases or when the debtors have taken action to shield themselves from any meaningful attempt to address their tax liability via the protection of the automatic stay. See, *e.g.*, *In re Hollowell*, 222 B.R. 790 (Bankr. N.D. Miss. 1998); *In re Miller*, 199 B.R. 631 (Bankr. S.D. Tex. 1996); *In re Clark*, 184 B.R. 728 (Bankr. N.D. Tex. 1995). In so holding, however, those courts have confused the doctrines of equitable estoppel and equitable tolling. The former requires as a predicate bad faith or obstructive conduct on the part of the litigation target. See *Wolin* v. *Smith Barney Inc.*, 83 F.3d 847, 852 (7th Cir. 1996) ("In the case of equitable estoppel, which requires active misconduct by the defendant, the plaintiff is not required to be diligent."), cited with approval in *Brockamp*, 519 U.S. at 349. Equitable tolling, by

contrast, turns upon the claimant's exercise of due diligence and the disruption occasioned by events beyond the party's control. *Ibid.*[18]

In sum, because the government's tax collection efforts were thwarted by the petitioners' serial bankruptcy filings, the government has not yet had the three years Congress afforded it for such efforts. Furthermore, no equitable or public policy interests are advanced by rewarding the serial filing of uncompleted bankruptcies. This Court therefore should hold that the three-year lookback period is tolled during earlier bankruptcies.

[18] Petitioners repeat the Sixth Circuit's error when they suggest (Br. 28) that equitable tolling is unnecessary because the government can seek to dismiss "bad faith" bankruptcy filings through the rules governing contested matters. See Fed. R. Bankr. P. 9014. In any event, the lengthy and elaborate proceedings that surround such contests make them a clumsy vehicle for expeditiously reviving the government's ability to pursue or preserve tax claims. See *In re Gier*, 986 F.2d 1326, 1328 (10th Cir. 1993) (identifying eleven "nonexhaustive" factors to be considered in deciding whether to dismiss for bad faith). Furthermore, some courts have indicated that a dismissal solely for "bad faith" is not available under Chapter 7. See *In re Huckfeldt*, 39 F.3d 829, 832 (8th Cir. 1994) (dismissal must be "for cause"); *In re Padilla*, 222 F.3d 1194, 1192 (9th Cir. 2000) (same). The ability of the government to have abusive serial filings dismissed is thus far less certain than petitioners suggest.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

The following is a non-exhaustive list of cases in which the federal government has litigated the tolling issue presented in this case:

Brustman v. *United States*, 99-1 USTC ¶50,348 (BAP 9th Cir. 1998);

In re Gurney, 192 B.R. 529 (BAP 9th Cir. 1996);

In re Brickley, 70 B.R. 113 (BAP 9th Cir. 1986);

In re Savini, 260 B.R. 689 (D.N.J. 2001);

United States v. *Messer*, No. 00 CIV. 2553 DLC 2000 WL 991337 (S.D.N.Y. July 19, 2000);

In re Offshore Diving & Salvaging, Inc., 242 B.R. 987 (Bankr. E.D. La.), aff'd, 99-2 USTC ¶ 50,994 (E.D. La. 1999);

In re Saunders, 240 B.R. 636 (S.D. Fla. 1999);

United States v. *Gilmore*, 226 B.R. 567 (E.D. Tex. 1998);

In re Pastula, 227 B.R. 794 (E.D. Mich. 1997);

In re Brent, 212 B.R. 311 (C.D. Ill. 1997);

Bosarge v. *United States*, 96-2 USTC ¶50,566 (S.D. Ala. 1996);

In re Ramos, 208 B.R. 655 (W.D. Tex. 1996);

In re Miller, 199 B.R. 631 (S.D. Tex. 1996);

Acosta v. *IRS*, 184 B.R. 544 (W.D. Tenn. 1995);

In re Eysenbach, 183 B.R. 365 (W.D.N.Y. 1995);

Solito v. *United States*, 172 B.R. 837 (W.D. La. 1994);

In re Grogan, 158 B.R. 193 (E.D. Calif. 1993), aff'd 168 B.R. 382 (BAP 9th Cir. 1994);

In re Linder, 139 B.R. 950 (D. Colo. 1992);

In re Deitz, 116 B.R. 792 (D. Colo. 1990);

In re Molina, 99 B.R. 792 (S.D. Ohio 1988);

In re Pattalochi, 269 B.R. 60 (Bankr. D. Wyo. 2001);

In re Fiels, 260 B.R. 362 (Bankr. D. Md. 2001);

In re Hoppe, 259 B.R. 852 (Bankr. E.D. Tex. 2001);

In re Evoli, 258 B.R. 839 (Bankr. M.D. Fla. 2001);

In re Schultz, 86 A.F.T.R.2d ¶ 5027 (Bankr. D.N.H. 2000);

In re Hamrick, 259 B.R. 224 (Bankr. M.D. Ga. 2000);

In re Morgan, 255 B.R. 247 (Bankr. N.D. Ga. 2000);

In re Kaiser, 242 B.R. 643 (Bankr. N.D. Ohio 1999);

In re Bair, 240 B.R. 247 (Bankr. W.D. Tex. 1999);

In re Barton, 236 B.R. 613 (Bankr. W.D. Va. 1999)

In re Burt, 237 B.R. 914 (Bankr. N.D. Miss. 1999);

In re Avila, 228 B.R. 63 (Bankr. D. Mass. 1999);

In re Tarullo, 85 AFTR2d ¶2000-459 (Bankr. N.D.N.Y. 1999);

In re Kelly, 99-2 USTC ¶51,002 (Bankr. C.D. Cal. 1999);

In re Thompson, 99-2 USTC ¶51,007 (Bankr. N.D. Ga. 1999);

In re Seawright, 1999 WL 1495417 (Bankr. D.N.J. 1999);

In re Tarullo, No. 97-12412, 1999 WL 1424988 (Bankr. N.D.N.Y. 1999);

In re Seawright, 1999 WL 1495417 (Bankr. D.N.J. 1999);

In re Fontes, 228 B.R. 3 (Bankr. N.D. Ala. 1998);

In re Daniel, 227 B.R. 675 (Bankr. N.D. Ind. 1998);

In re Hollowell, 222 B.R. 790 (Bankr. N.D. Miss. 1998);

In re Thomas, 222 B.R. 742 (Bankr. E.D. Pa. 1998);

In re Blakely, 219 B.R. 722 (Bankr. S.D. Miss. 1998);

In re Collins, 223 B.R. 372 (Bankr. M.D. Fla. 1997);

In re Little, 216 B.R. 769 (Bankr. E.D.N.C. 1997);

In re Zecco, 211 B.R. 109 (Bankr. D. Mass. 1997);

In re Rangel, 209 B.R. 744 (Bankr. D. Colo. 1997);

In re McMillan, 204 B.R. 835 (Bankr. M.D. Ga. 1996);

United States v. *Colvin*, 203 B.R. 930 (Bankr. N.D. Tex. 1996);

In re Darden, 202 B.R. 715 (Bankr. E.D. Va. 1996);

In re Cowart, 199 B.R. 799 (Bankr. M.D. Fla. 1996);

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No. 00-1567

In the Supreme Court of the United States

Cornelius P. Young and Suzanne P. Young,
Petitioners,

v.

United States of America,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITIONERS' REPLY BRIEF

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ARGUMENT

The government's argument for automatic tolling of the three-year "lookback" period of Bankruptcy Code §507(a)(8)(A)(i) is flawed for three basic reasons. First, the government considers it axiomatic that the three-year lookback period is a period during which the government is "guaranteed" the ability to collect taxes. Secondly, it considers the automatic bankruptcy stay to be an impenetrable bar that forbids it from collecting a "penny" on its debts. Finally, it assumes that the Youngs and the many other debtor-taxpayers that have litigated this issue are all involved in nefarious tax evasion schemes in which they plot to shift their share of taxes to honest taxpayers. For the reasons that follow, none of these propositions is supportable.

I. THE THREE-YEAR LOOKBACK PERIOD IS NOT A GUARANTEED COLLECTION PERIOD

The government argues repeatedly throughout its brief that the three-year lookback period of Bankruptcy Code §507(a)(8)(A)(i) is a period for collecting taxes, not a part of the definition of which taxes are dischargeable in bankruptcy. For example, the government asserts at page 12 of its brief that failure to allow equitable tolling of the three-year lookback period will result in the government being "...denied the time Congress provided for enforcement in the bankruptcy context." A bit later, the government refers to "...the great weight Congress placed on ensuring the government a three-year period in which to collect tax claims." *Id.* at 13. At page 26, the government speaks of "...Congress's intent to give the government a full three years to collect taxes;..." and later on the same page asserts that

"The balance that Congress struck guaranteed federal, state, and local taxing authorities three years to collect income taxes..." Further along at page 40, it advocates that equitable tolling should apply uniformly to allow "...the government its full three years to pursue the tax claim." and sums up at page 42 with the argument that because of the Youngs' "...serial bankruptcy filings, the government has not yet had the three years Congress afforded it for such efforts."

The proposition that the three-year lookback period is a guaranteed collection period is false for several reasons. First, the legislative history of the enactment in 1966 of the three-year lookback period indicates that Congress was trying to balance three competing policies: the need to give debtors a fresh start unburdened by large accumulations of stale tax claims, the interests of general creditors who do not want to see a debtor's funds exhausted by the payment of stale tax claims, and the public's interest in preventing tax evasion and loss of tax revenue. Both parties agree that these are the concerns Congress had before it in 1966. Pet. Br. 15-16; Gov't. Br. 15-17. Congress responded by enacting the three-year lookback period, which defined which taxes were stale, and thus dischargeable, and which were not. Nowhere in the legislative history, however, is there reference to the three-year period as a guaranteed collection period.

Although the three-year lookback period was intended to define which taxes could be discharged as stale, it of course had the effect of allowing the IRS to collect taxes from a delinquent taxpayer while the taxpayer awaited expiration of the three-year period. It is hardly surprising, then, that the legislative history of the enactment of the Bankruptcy Code refers to allowing the tax collector a "reasonable" or "adequate" time to collect taxes before they are eligible for

discharge in bankruptcy. See Gov't. Br. 17-19. Nothing in this legislative history, however, indicates an intention to specifically guarantee a full three-year collection period to the IRS before taxes could be discharged.

This is because the three-year lookback provision is not the only measuring period that defines which taxes can be discharged. Bankruptcy Code §507(a)(8)(A)(ii) provides that income taxes can be discharged if they were assessed more than 240 days prior to filing the bankruptcy petition. In the Youngs' case, their 1992 income taxes were assessed on January 3, 1994 (App. 6). Since the Youngs had not filed an offer in compromise (App. to Pet. for Cert. 15a; App. 5-8), the 240-day period was not enlarged, and thus expired on August 31, 1994. Since this date fell well before the filing of the Youngs' bankruptcy petitions — their chapter 13 was filed on May 1, 1996, and their chapter 7 on March 12, 1997 — the Youngs met this requirement for discharge of their tax obligation, and the 240-day period is not an issue in this appeal.[1]

Another measuring period is found at Bankruptcy Code §523(a)(1)(B)(ii). That subparagraph provides that taxes are not discharged where the debtor has filed a tax return late and files a bankruptcy petition within two years of filing his tax return. Stated another way, the taxpayer must wait for two years to elapse from the date of filing a late return before filing a bankruptcy petition that will discharge

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[1] The debtors' tax obligation must meet all the Bankruptcy Code's measuring periods to be discharged.

the tax obligation reflected on that return.[2]

The two-year measuring period did not apply to the Youngs since they filed their 1992 tax return on time on October 15, 1993, after obtaining two filing extensions. App. 6.[3] In other circumstances, however, either the two-year or 240-day period could come into play as the controlling measurement, thereby effecting a period shorter than three years for tax collection. For instance, assume a taxpayer who has filed a return on time and paid the tax shown on the return

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[2] A taxpayer must also satisfy the 240-day and three-year measuring periods to be able to discharge taxes reflected on a late-filed return. Furthermore, tax obligations reflected on a late-filed return do not attain priority status in chapter 13, and are treated as general unsecured claims, assuming that the three-year and 240-day measuring periods elapsed before the filing of the chapter 13 petition.

[3] Had the Youngs filed their 1992 tax return on October 15, 1993 *without* obtaining the two filing extensions, their tax obligation would have been a non-priority claim in their chapter 13 proceeding (and dischargeable had their plan been completed) or simply discharged in their chapter 7 proceeding. This is because the due date for filing the return (*without* extensions) would have been April 15, 1993. Three years from April 15, 1993, expired on April 15, 1996; the Youngs' first bankruptcy filing was 16 days later on May 1, 1996, so the three-year rule would have been satisfied. The two-year rule for a late-filed return (filing on October 15, 1993, without obtaining the extensions makes it late) would have been also satisfied, since that period expired on October 15, 1995. Of course the 240-day period ran out on August 31, 1994.

In effect, the Youngs are penalized for complying with the law by obtaining the extensions. The fact that they obtained the extensions also suggests that the Youngs were not involved in a manipulative scheme of tax avoidance.

in full. About two years[4] later, the IRS decides to conduct an audit because it questions some deductions claimed by the taxpayer on his or her return. The taxpayer meets with a revenue agent, the agent requests that records substantiating the deductions be produced by a certain date, discussions are held, more records are requested and produced, and time passes. The taxpayer does not agree with the adjustments sought by the IRS, and consequently the District Director sends the taxpayer a so-called 30-day letter. The taxpayer fails to respond to this notice, so the IRS sends a statutory notice of deficiency, also known as the 90-day letter. The taxpayer then has 90 days to petition the United States Tax Court to contest the IRS's determination. The taxpayer fails to file a petition with the tax court, so the IRS thereupon proceeds to assess the additional tax. By this time, there are only two months left before expiration of the three-year period allowed under IRC §6501(a) to assess the tax. Two hundred forty-one days after the assessment, the taxpayer files for bankruptcy. The taxes assessed eight months earlier

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[4] It is not unusual for the IRS to initiate an audit (or "examination" in IRS parlance) two years from the filing of a return. The IRS follows a so-called audit cycle, which provides that examination of individual tax returns must be completed within twenty-six months of filing. M. Saltzman, *IRS Practice and Procedure* (1991), ¶ 8.06, p. 8-30. Indeed, Congress appears to have had the audit cycle in mind when it enacted the three-year lookback period as part of the Bankruptcy Code: "Because of the difficulty of auditing and collecting income taxes, the priority is left at three years. However, with respect to other taxes, such as customs, excise and property taxes, it is easier for the taxing authority to discover a delinquency and easier to audit, because the computations necessary to determination of those taxes are not as intricate as those necessary for income taxes." H.R. Rep. No. 595, 95th Cong., 1st Sess. 190-91 (1977).

will be discharged, as both the three-year and 240-day measuring periods have been satisfied, even though the IRS has had only 240 days to collect the recently-assessed taxes.

Similarly, in the hypothetical involving the Youngs described earlier at footnote 3, the IRS did not have a full three years to collect the tax, since the return was filed six months late on October 15, 1993. Generally, until a return is actually filed, the tax cannot be assessed,[5] and until it is assessed, it cannot be collected.[6] Using the dates in the Youngs' hypothetical, then, the taxes would be discharged, even though the IRS had only two years and 117 days between the assessment date (January 3, 1994) and the chapter 13 filing date (May 1, 1996) to collect. If measured from the date the return was filed, October 15, 1993, there elapsed two years and 198 days, still less than three years.

Congress, then, did not enact the three-year lookback period in Bankruptcy Code §507(a)(8)(A)(i) as a guaranteed time allowance for collecting overdue taxes before they became eligible for discharge under the Bankruptcy Code. While the three-year lookback period may have the effect of

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[5] The IRS can assess a tax without having received the taxpayer's return by preparing a "substitute for return" from whatever information it has (prior year's return, W-3 forms from employers, 1099 forms from banks and so forth) and then assessing a tax based on this return. IRC 6020(b).

[6] This is an over-generalization, but only slightly so. The IRS may, "without assessment," sue in court to collect taxes, provided that it brings suit within three years of the filing of the return. IRC 6501(a). This happens so infrequently, however, that as a practical matter the proposition is true.

affording the IRS a full three years of collection activity in some circumstances, Congress' enactment of the 240-day and two-year measurement periods sharply reduces the time available for collection in other circumstances where those provisions come into play. Since these measurement periods do not guarantee a full three years of enforced collection activity in all circumstances, we must regard them not as tax collection windows, but as separate parts of the definition of dischargeable taxes.

Indeed, Congress, when discussing the tolling of limitation periods under Bankruptcy Code 108(c), regarded the explicit tolling provisions there (along with the complementary provisions of IRC §6503(b) and (h)) as ". . . protect[ing] the right of governmental units (and other creditors) to collect debts which are *not discharged* in the bankruptcy proceeding." S.Rep.No. 989, 95th Cong., 2nd Sess., 14-15, (emphasis added), quoted at Gov't. Br. 18. From the same report, as quoted in both the government's brief (pp. 19, 37) and the petitioners' brief (p. 20), taxing authorities shall have "adequate time to collect *nondischargeable* taxes following the end of the title 11 proceedings" (emphasis added). The Youngs do not (and indeed cannot) have any quarrel with allowing the IRS — since Congress has explicitly so provided — an extension, measured by the duration of their bankruptcy proceedings, of the ten-year period allowed under IRC §6502(a)(1) for the collection of any nondischargeable taxes they owe. They object only to being denied a discharge of their 1992 taxes, which the Bankruptcy Code (including the tolling provisions of §108(c)) explicitly defines as dischargeable.

II. CONTRARY TO THE PREMISE OF THE GOVERNMENT, THE AUTOMATIC STAY DOES NOT PROHIBIT IT FROM COLLECTING MONEY FROM DEBTORS WHILE THEY ARE IN BANKRUPTCY

Another axiom of the government's argument is that the automatic stay precludes the IRS from collecting even "a penny"[7] from debtors while they are in bankruptcy. It assumes such preclusion under the question it presents to this Court at the outset of its brief (p. (I)), and repeats the proposition several more times.

For example, at page 8, it asserts that the petitioners' chapter 13 filing "...barred the government from taking any further measures to collect the remaining unpaid taxes." Later, it advocates tolling of the three-year lookback period for "...the period in which the automatic stay in the chapter 13 bankruptcy case precluded the government from enforcing its claim." Gov't. Br. 10. Further along, it argues that equitable tolling of the three-year lookback period is appropriate for the length of time the government "...is legally barred from enforcing its claim..." in a prior bankruptcy. *Id.* at 12. Finally, it urges this Court to adopt a uniform rule that equitable tolling be applied for the length of time that the automatic stay "...denied the government its full three years to pursue the tax claim." *Id.* at 40.

The petitioners have pointed out in their main brief (pp. 21-25) that the automatic stay does not prevent the IRS

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[7] Gov't. Br. at 27, n. 8.

from collecting taxes from debtors for the entire duration of their reorganization proceeding, whether completed or aborted, even if the automatic stay remains in force with respect to the IRS for that length of time. We pointed specifically to the *Brickley* case (*Brickley v. United States (In re Brickley)*, 70 B.R. 113 (9th Cir. B.A.P. 1986)), indicating that, assuming the Brickleys' chapter 13 plan had indeed been confirmed, the IRS was receiving payments on its tax claim while the chapter 13 proceeding was ongoing, and even with the automatic stay still in force.

Admittedly, the Youngs' case is different. As the government correctly points out (Gov't. Br. 8) the Youngs' plan was not confirmed,[8] and with the filing of their notice of dismissal, the plan payments they had already paid to the chapter 13 trustee were refunded to them and were not paid to the IRS or any other creditor. Between the filings of their chapter 13 petition and their notice of dismissal there elapsed 176 days, after which the automatic stay dissolved by reason of Bankruptcy Code §362(c)(2)(B).

For these 176 days, the IRS was barred by the automatic stay from enforced collection, such as filing a notice of a tax lien with respect to the Youngs' property, or levying their bank accounts or salaries. Nevertheless, the IRS did file two proofs of claim in the Youngs' chapter 13 case (the second amended the first, App. 18-27), and had the Youngs' plan been confirmed on November 15, 1996, the IRS

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[8] The Youngs' chapter 13 case was filed on May 1, 1996; the hearing on confirmation of the debtors' chapter 13 plan was scheduled for November 15, 1996. App. 11. The Youngs filed their notice of dismissal on October 23, 1996, about three weeks prior to the scheduled confirmation hearing.

would have received both its share of the plan payments accumulated by the chapter 13 trustee while awaiting confirmation as well as regular plan payments thereafter.

Looking at the specifics of the Brickleys' and Youngs' situations suggests that the uniform tolling rule that the government urges this court to adopt (Gov't. Br. 40) be examined more closely. Of course, the Youngs do not concede that a tolling rule of any type is permissible, since a plain reading of the applicable statutes does not allow for one.

The rule urged by the government provides that "Equitable tolling should apply uniformly in all cases where the automatic stay entered in a debtor's earlier bankruptcy proceeding denied the government its full three years to pursue the tax claim." *Id.*

In the Brickleys' case (assuming their chapter 13 plan had indeed been confirmed), the IRS was collecting payments on the Brickleys' tax obligations even while they were in chapter 13, and even while the automatic stay was in force. The Brickleys remained in bankruptcy for about two years and nine months before they elected to dismiss their case; their plan (assuming it was confirmed) had to provide for ". . .the full payment, in deferred cash payments, of all claims entitled to priority under section 507...." Code §1322(a)(2). Furthermore, the Brickleys had to start making plan payments to the chapter 13 trustee within 45 days[9] of filing their chapter 13 petition. Once their plan was confirmed, the chapter 13

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[9] Debtors have 15 days from filing their bankruptcy petition to file their chapter 13 plan, unless extended by the court (Bankruptcy Rule 3015(b)), and 30 days after filing the plan to commence making plan payments (Bankruptcy Code §1326(a)(1)).

trustee would have distributed the plan payments accumulated pre-confirmation to creditors, including of course the IRS. Thus, in the Brickleys' case, the IRS collected at least 31 months' worth of payments, even while the automatic stay was in full force preventing "pursuit" of the debtors. Furthermore, the payments had to be of a magnitude that would have paid off the Brickleys' IRS obligations "in full" by the end of their plan.

Yet the tolling rule advocated by the IRS, if we understand it correctly, would simply toll the three-year lookback period by the amount of time the automatic stay was in effect during the prior bankruptcy proceeding regardless of what was paid to the IRS during that proceeding. The proposed rule thus overreaches. The premise of the proposed tolling rule is to allow the government a full three years from the due date of the return to "pursue" collection of delinquent taxes from debtors; if the IRS had collected payments from the Brickleys for 31 or 32 of the 33 months the Brickleys were in chapter 13, there is no logical reason to allow tolling beyond the one or two months at the outset of the case when the Brickleys were filing their plan and getting up to speed with their payments.[10]

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[10] In the Youngs' case, their chapter 13 plan was not confirmed, and the plan payments they had been making to the chapter 13 trustee pre-confirmation were refunded to them upon dismissal. The Youngs' chapter 13 case lasted 176 days until dismissal, during which the automatic stay prevented "pursuit" by the IRS. Applying a logical tolling rule in the Youngs' case would allow tolling for 176 days, which would reduce the Youngs' lookback period to two years, 336 days. Of course, the Youngs consider that tolling of whatever length, and however computed, is not permitted under the Bankruptcy Code except as explicitly set

If tolling for tax claims is allowed, logic also requires that tolling be allowed for priority unpaid wage claims, as defined by Code §507(a)(3), and priority unpaid employee benefit claims as defined by Code §507(a)(4). The first of these subsections, (a)(3), allows as a priority claims for unpaid wages, salaries and commissions of up to $4,650 earned by the debtor's employees within 90 days of the petition date or the date on which the debtor's business ceased, whichever is earlier. The following subsection, (a)(4), provides priority treatment of claims for unpaid contributions to an employee benefit plan arising from services rendered within 180 days prior to the filing of the debtor's bankruptcy petition. Both types of claims enjoy payment priority ahead of recently-incurred tax claims, as defined at § 507(a)(8), in a chapter 7 liquidation. Both types of claims would have to be paid in full, together with priority tax claims, in a chapter 13 case. Code §1322(a)(2).

Within Code §507, the only types of claims that incorporate time elements as part of their definitions are wage and salary claims, §507(a)(3), employee benefit plan claims, (a)(4), and tax claims, (a)(8). The logic of tolling requires that the 90-day and 180-day lookback periods of §507(a)(3) and (a)(4) be tolled as well if tolling is applied to tax claims. Yet research has not revealed any case to the petitioners in which tolling of the 90 and 180 day lookback periods has ever been granted by reason of a prior bankruptcy filing. Allowing tolling only for tax claims, and not the wage and benefit claims, could, in certain circumstances[11] allow the tax claim

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forth therein.

[11] To illustrate, take the Youngs' actual situation, which is described above at footnote 3. Add the fact that Mrs. Young

to leapfrog ahead of the wage and benefit claimants on the priority ladder set by Congress at Code §507. Among other things, this would violate this Court's holding in *United States v. Noland*, 517 U.S. 535 (1996), which prohibited a bankruptcy court from a categorical reordering of the priorities set forth at Code §507 through the application of equitable considerations.

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operated a business as a proprietor under the name of "Young Impressions Art Studio." App. 10, 34. Imagine, hypothetically, that at the time her chapter 13 petition was filed on May 1, 1996, that she had accrued a debt 20 days earlier for an unpaid contribution to an employee benefit plan for her employees. By reason of Code §1322 (a) (2), the Youngs' chapter 13 plan had to provide for payment in full over the course of the plan of both the claim for the contribution to the employee benefit plan as well as the IRS claim.

The Youngs dismiss their chapter 13 case on October 23, 1996, and file for chapter 7 on May 12, 1997, 147 days after dismissal. Assume, hypothetically, that there are assets in the chapter 7 case, but they are insufficient to pay both the contribution to the employee benefit plan and the IRS in full.

The chapter 7 trustee proceeds under Code §726(a)(1) to distribute assets of the bankruptcy estate in accordance with the priorities set out at §507. With no tolling allowed whatsoever, both the contribution claim and tax claim are paid prorata as general claims; claims having priority, such as a claim for alimony or child support, are paid first. Code §507(a)(7). Allowing tolling for both the contribution claim and IRS claim places the contribution claim ahead of the support claim and the IRS claim behind it. Allowing tolling for the IRS alone places the IRS claim behind the support claim but ahead of the contribution claim.

III. THE PETITIONERS ARE NOT INVOLVED IN A TAX-AVOIDANCE SCHEME.

The government also argues that debtors have, on a widespread basis, tried to use the mechanism of serial bankruptcy filings as a tax-avoidance scheme. Gov't. Br. at 12-13. It appears to cast the Youngs among these ("Petitioners' manipulation of the Code...," *id.* at 26), even though the bankruptcy court below found that "...it imputes no bad faith on the Plaintiffs...." App. to Pet. for Cert. 20a.

This finding of the bankruptcy court is supported by the record. Between the due date for filing their 1992 tax return, October 15, 1993, and the filing of their chapter 7 bankruptcy proceeding on March 12, 1997, there elapsed three years and 147 days. Subtracting out the 176 days that they were in chapter 13 (should tolling apply) left the Youngs 29 days short of a full three years exposure to the IRS's collection efforts. During this period, the Youngs made monthly payments to the IRS for 20 months between April 1994 and November 1995. App. 6-8. The Youngs did not file their chapter 13 bankruptcy until May 1, 1996, two years and six and one-half months after the due date for filing their 1992 tax return. While in Chapter 13, they sold their house, paid off mortgage and tax liens on it in the process, and later became involved with hiring Attorney Norene Farr for a purpose that does not appear in the record.

This is not a picture of people engaged in a manipulative scheme to avoid paying taxes. Indeed, the government, in responding to the Youngs' complaint to have their 1992 tax obligation discharged, did not attempt to submit any evidence of the Youngs' motives; instead it proceeded

directly to filing a motion for summary judgment without even filing an answer to the Youngs' complaint. App. 1.

Even among the scores of other taxpayer-debtors who have litigated this issue, few have actually been found to be involved in a bad-faith manipulative scheme of tax avoidance. Three cases cited by the government (Gov't. Br. 22, n. 6), *In re Hollowell,* 222 B.R. 790 (Bankr. N.D.Miss. 1998); *In re Miller,* 199 B.R. 631 (Bankr. S.D.Tex. 1996) and *In re Clark,* 184 B.R. 728 (Bankr.N.D. Tex. 1995) appear to be the exceptions that prove the rule. Elsewhere, while courts (including the bankruptcy court and court of appeals below) talk of the possibility of taxpayer manipulation, they seldom find that the taxpayers that are appearing before them have actually been carrying on some manipulative tax-avoidance scheme. Indeed, the large volume of litigation on this issue can be better explained by the existence of a large number of debtors who believe that the Bankruptcy Code means what it says and are then surprised to find that the government thinks otherwise.

IV. THIS COURT SHOULD LOOK TO THE LANGUAGE OF THE STATUTES THEMSELVES TO DETERMINE CONGRESSIONAL INTENT.

In this appeal, the government has argued that legislative history and the statutory schemes of the Internal Revenue and Bankruptcy Codes, when taken as a whole, prove its two hypotheses: (a) that taxing authorities are entitled to a full three years in which to collect overdue taxes; and (b) that bankruptcy proceedings automatically prevent any collection whatsoever of these taxes while such proceedings

are pending. The government's approach puts the cart before the horse. Rather than focusing on the language of Congressional debates, committee hearings and reports to determine Congressional intent, it should have first looked at the ultimate distillation of Congressional intent: the language of the statutes themselves. Only if a reading of these statutes created an ambiguity or created absurd results demonstrably at odds with the intent of Congress is it necessary to delve into legislative history and the entirety of the legislative scheme.

The government has not met its burden in this case. The statutes are intricate, complex and convoluted, but they are not ambiguous. Nor does a plain reading of them create absurd results that do not comport with the intent of Congress. To the contrary, they carry out the intent of Congress to balance the tension between giving debtors a fresh start unencumbered by the burden of large accumulations of stale tax claims, the interests of creditors who do not want to see a debtor's funds exhausted by the payment of stale tax claims, and the public's interest in preventing tax evasion and loss of tax revenue. These purposes are reflected both in legislative history and in the statutory schemes taken as a whole.

The government's insistence that its two hypotheses also be incorporated into the already-complex statutory schemes of the Bankruptcy Code and Internal Revenue Code would unbalance the mechanism that Congress has already enacted. The solution to what the government perceives as manipulative schemes to avoid paying taxes should not be formulated by forcing an oversized roughly-hewn square peg into a finely-machined round hole. The IRS should instead participate in, and not merely spectate at, bankruptcy

proceedings, including in particular the few bankruptcy cases where there is genuine manipulation and abuse. It should also allow the honest taxpayer-debtors the relief Congress intended them to have.

CONCLUSION

For the reasons set forth above and in the petitioners' main brief, this Court should reverse the holding of the United States Court of Appeals for the First Circuit and hold that the Youngs' 1992 income tax obligation was discharged by their chapter 7 bankruptcy.

Respectfully submitted,

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